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N. 9847

Nos. 14030, 14031, 14032, 14033, 14034

United States
Court of Appeals
For the Ninth Circuit.

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend LEE BEN KOON,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-13-53

Nos. 14030, 14031, 14032, 14033, 14034

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

RODNEY W. BANKS,

1208 Public Service Building,
Portland 4, Oregon, and

J. P. SANDERSON,

301-2 Second & Cherry Building,
Seattle 4, Washington,

For Appellants.

HENRY L. HESS,

United States Attorney, and

VICTOR E. HARR,

Assistant United States Attorney,

United States Courthouse,
Portland, Oregon,

For Appellee.

In the District Court of the United States
for the District of Oregon

No. Civ. 6757

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend, LEE BEN KOON,

Plaintiffs,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

COMPLAINT

Comes now Lee Gwain Toy and Lee Gwain Dok, by their father and next friend, Lee Ben Koon, and for cause of action allege as follows:

I.

That plaintiffs, Lee Gwain Toy and Lee Gwain Dok, bring this action through their father and next friend, Lee Ben Koon, a citizen of the United States and a resident of Portland, Multnomah County, Oregon.

II.

That the defendant, Dean G. Acheson, is the duly appointed, qualified and acting Secretary of State of the United States of America; and that the American Consul General at Hong Kong is an officer of the United States and an executive official of the Department of State of the United States,

acting under and by direction of defendant, Dean G. Acheson, as Secretary of State.

III.

That jurisdiction of this action is conferred upon this court by Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C. 903.

IV.

That the plaintiff, Lee Gwain Toy, was born in Lun Hing Village, Kwang Tung, China, on the 14th day of March, 1934, and plaintiff, Lee Gwain Dok, was born in Lun Hing Village, Kwang Tung, China, on the 12th day of December, 1932, and they are presently residing in Hong Kong, and are citizens of the United States under Section 1993 of the Revised Statutes, 8 U.S.C. 6, First Edition.

V.

Lee Ben Koon, the father of the plaintiffs, was born in China in the year 1912 and arrived in the United States at Seattle, Washington, April 9, 1928, on the Steamship President Grant and was then admitted into the United States as a Citizen thereof on the ground and for the reason being that he was a foreign born son of a native citizen of the United States, as provided for by Section 1993 of the Revised Statutes, 8 U.S.C. 6, First Edition.

VI.

That the plaintiffs, Lee Gwain Toy and Lee Gwain Dok, are citizens of the United States under Section 1993 of the Revised Statutes, 8 U.S.C. 6, First Edi-

tion, and claim the City of Portland, Oregon, as their permanent residence, which is the place of residence of their father and within the jurisdiction of this court; that plaintiffs claim the right of entering the United States as Nationals and/or Citizens of said United States.

VII.

That said Lee Ben Koon caused to be filed with the American Consul General at Hong Kong his affidavit—application, dated February 9, 1952, prepared in accordance with the regulation for a passport or travel document in behalf of the said Lee Gwain Toy and prepared a similar affidavit-application, dated March 17, 1952, in behalf of Lee Gwain Dok, in order that the plaintiffs would be eligible to purchase transportation to the United States in order to apply for admission as Citizens thereof at a port of entry under the Immigration Laws.

VIII.

That although the plaintiffs have been interviewed by the said American Consulate at Hong Kong, no action has been taken by the said Consulate concerning the issuance of passports or travel documents and the plaintiffs believe and therefore allege that the said American Consulate has no intention of issuing to plaintiffs passports or travel documents, and that the said American Consulate's failure to issue such passports or travel documents constitutes an unreasonable and unfair delay and a denial of plaintiffs' rights as American Citizens,

and plaintiffs have been thereby denied from coming to the United States and from applying and presenting the proof of their citizenship to the Immigration and Naturalization Service at a port of entry; that since the said American Consulate has refused to take any action as aforesaid, there has been no official denial of the plaintiffs' petitions by the said American Consulate and, therefore, the defendant did and has refused to take cognizance of any appeal, and that the said American Consulate by their delaying tactics has prevented the plaintiffs from taking any action by appeal or otherwise, and the plaintiffs' only remedy is under Section 503 of the Nationality Act of 1940 for the reason that they can obtain no relief whatsoever from the said American Consulate.

IX.

That this case is held subject to investigation and consideration under a new and secret system limited to the Chinese Race, devised by the American Consul General at Hong Kong, not within any regulation, and of a class restriction within the term "Class Legislation" and therefore is in violation of law.

X.

That plaintiffs, Lee Gwain Toy and Lee Gwain Dok, claim United States Nationality and Citizenship in good faith and on a substantial basis.

Wherefore, plaintiffs, Lee Gwain Toy and Lee Gwain Dok, pray for an order and judgment of this court as follows:

(1) That an order directed to the defendant, Dean G. Acheson, to issue and grant plaintiffs a Certificate of Identity in order that they be eligible to obtain transportation to the United States and be temporarily admitted under bond, in the sum of $500.00 each, for the purpose of prosecuting said claims of citizenship in this court.

(2) That a decree be entered herein adjudging Lee Gwain Toy and Lee Gwain Dok to be Nationals and/or Citizens of the United States.

(3) That plaintiffs be granted such other and further relief as may be just in the premises.

/s/ RODNEY W. BANKS,

/s/ J. P. SANDERSON,

Attorneys for Plaintiff.

[Endorsed]: Filed December 19, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for and on behalf of the defendant above named, and in answer to the complaint on file herein, admits, denies and alleges as follows:

1. Denies the allegations of Paragraph I.

2. Admits that during the times involved herein, the allegations as contained in Paragraph II of said complaint were true.

3. Admits the allegations of Paragraph III.

4. Answering Paragraphs IV, V, VI, VII, VIII, IX and X, defendant lacks information as to the truth or falsity of the allegations therein contained, and therefore denies the same and puts plaintiff to proof thereon.

Wherefore, defendant, having fully answered plaintiff's complaint, prays that the same be dismissed and held for naught and that defendant recover its costs and disbursements incurred herein.

HENRY L. HESS,
United States Attorney for
the District of Oregon;

/s/ VICTOR E. HARR,
Assistant United States
Attorney.

I, Victor E. Harr, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Answer of defendant by depositing in the United States Post Office at Portland, Oregon, on the 16th day of February, 1953, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Rodney W. Banks, 1208 Public Service Building, Portland 4, Oregon, and J. P. Sanderson, 301-2 Second & Cherry Building, Seattle 4, Washington, attorneys of record for plaintiffs.

/s/ VICTOR E. HARR,
Assistant United States
Attorney.

[Endorsed]: Filed February 16, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

The Attorney General of the United States, by and through Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, moves the Court for an order dismissing the above-entitled case upon the ground and for the reason that the complaint herein, on its face, shows that applications for passports have not been denied plaintiffs and therefore plaintiffs have not been denied any rights on their alleged claim of citizenship, a jurisdictional requirement under Title 8, Section 903, U.S.C.

Dated at Portland, Oregon, this 6th day of April, 1953.

HENRY L. HESS,
United States Attorney for
the District of Oregon;

/s/ VICTOR E. HARR,
Assistant United States
Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 6, 1953.

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF PARTY DEFENDANT

The plaintiffs move the court as follows:

For an order substituting John Foster Dulles, Secretary of State of the United States of America, as party defendant for Dean G. Acheson, formerly Secretary of State of the United States of America, on the ground that said Dean G. Acheson has ceased to hold the office of Secretary of State of the United States of America and that the said John Foster Dulles has been appointed to such office and qualified as such officer of the United States of America, and that there is substantial need for continuing and maintaining the above-entitled action.

RODNEY W. BANKS,

J. P. SANDERSON,

By /s/ RODNEY W. BANKS,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed April 15, 1953.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR SUBSTITUTION OF PARTY DEFENDANT

State of Oregon,
County of Multnomah—ss.

I, Rodney W. Banks, being first duly sworn, depose and say:

That I am one of the attorneys for the plaintiffs in the above-entitled action. That Dean G. Acheson ceased to be Secretary of State of the United States of America by resignation on the 22nd day of January, 1953, on which date John Foster Dulles was sworn in and qualified as Secretary of State of the United States of America by appointment of the President of the United States of America. That the American Consul General at Hong Kong, China, is now acting under and by direction of the said John Foster Dulles, Secretary of State of the United States of America. That the said John Foster Dulles, Secretary of State of the United States of America, has not indicated any change in ruling or attitude concerning relief prayed for in plaintiffs' complaint from that of his predecessor, the defendant above named.

That in order to obtain the relief prayed for in plaintiffs' complaint, under the provisions of Section 503 of the Nationality Act of 1940, 54 Stat. at large 1171; 8 U.S.C.A., 903, it is necessary to continue and maintain, and there is substantial need for continuing and maintaining, said action, and that the said John Foster Dulles, Secretary of State of the United States of America, be substituted as party defendant under the provisions of Rule 25-D of the Court Rules of Procedure.

/s/ RODNEY W. BANKS.

Subscribed and sworn to before me this 14th day of April, 1953.

[Seal] /s/ CARRIE BELLE CANN,
Notary Public for Oregon.

My commission expires Oct. 1, 1955.

[Endorsed]: Filed April 15, 1953.

In the District Court of the United States
for the District of Oregon

Civ. 6622

WOO CHIN CHEW, by His Next Friend, WOO YUEN PAK,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

Civ. 6751

JOONG TUNG YEAU, by His Brother and Next Friend, JOONG YUEN HING,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

Civ. 6752

LEE WING GUE, by His Father and Next Friend, LEE SUN YUE,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

Civ. 6757

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend, LEE BEN KOON,

Plaintiffs,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

Civ. 6762

LOUIE HOY GAY, by His Father and Next Friend, LOUIE FOO,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

Civ. 6763

CHIN CHUCK MING and CHIN CHUCK SANG, by Their Next Friend and Father, CHIN AH POY,

Plaintiffs,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

MEMORANDUM OPINION

May 25, 1953

James Alger Fee, Chief Judge:

In each of these cases, it has been represented that the petitioner is a resident of China who has never been in the United States and who claims citizenship by birth in a foreign country through his father, who is claimed to be a citizen of the United States. The history of the Chinese cases which have been administratively handled with appeal to the appellate courts of the federal system convinces the Court that the statute under which these cases were brought was not intended as a substitute for the administrative hearing by experts, which has been used for half a century. The danger of fraud in these cases has been apparent during that time, and, with the present disturbed political situation in China, which also affects the world, it is the opinion of the Court that the State Department should not be required to bring these persons into the country and release them for the purpose

of trying out the question of their citizenship in the courts.

Aside from that point, however, in these cases the proceeding was originally brought against Dean G. Acheson, as Secretary of State, and in each a motion has been made to substitute John Foster Dulles. The Court is of opinion that the new Secretary of State should have an opportunity to have these questions passed upon originally by his administrative staff, and thereafter, if this statute is applicable, the actions could be filed again. The Court therefore finds that the plaintiffs have not shown that there is a substantial need for continuing the within actions against John Foster Dulles, successor to Dean G. Acheson, or that the former adopt or continue or threaten to adopt or continue the action of his predecessor. In view of the fact that substitution cannot be made, the Court dismisses each of these causes.

The last case differs from the others in that no motion for substitution has been filed. The same considerations apply. But, under the circumstances, it is dismissed for failure to prosecute.

[Endorsed]: Filed June 1, 1953.

In the United States District Court
for the District of Oregon

Civil No. 6757

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend, LEE BEN KOON,

Plaintiffs,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

ORDER OF DISMISSAL

This matter came on to be heard before the undersigned Judge on Monday, April 20, 1953, upon motion of defendant by and through Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for an order dismissing the above-entitled case upon the ground and for the reason that the complaint on its face shows that application for passport had not been denied plaintiffs and therefore plaintiffs have not been denied any rights on their alleged claim of citizenship, a jurisdictional requirement under Title 8, Section 903, U.S.C.A.; and it appearing that there is on file in the within cause a motion of plaintiffs, through their attorneys, Rodney W. Banks and J. P. Sanderson, for an order to substitute John Foster Dulles, Secretary of State of the United States of America, as party defendant for Dean G. Acheson, formerly the Sec-

retary of State of the United States of America, on the ground that there is substantial need for continuing and maintaining the above-entitled action; and further that it having been stated into the record by plaintiffs' counsel that plaintiffs have never resided in the United States; and the Court having considered the record herein, statement of counsel, Rodney W. Banks, of attorneys for plaintiffs, and Victor E. Harr, of attorneys for defendant, and being of the opinion that Congress in enacting Section 903, Title 8, U.S.C.A., never intended said section to be applicable to the claims of the nature herein asserted by plaintiff, and being advised in the premises, it is

Ordered that plaintiffs' motion to substitute John Foster Dulles, Secretary of State of the United States of America, as party defendant for Dean G. Acheson, be and it is hereby denied, and

It Is Further Ordered that defendant's motion to dismiss the above-entitled cause upon the ground and for the reason that the complaint on its face shows that plaintiffs' applications for passports had not been denied them, be and the same is hereby allowed, and

It Is Further Ordered that the within cause be and the same is hereby dismissed for the following reasons:

1. That the application as made to the American Consulate Officer of the Department of State by plaintiffs to permit plaintiffs' entry into the United States has never been denied plaintiffs;

2. That plaintiffs have failed to show, in accord-

ance with Rule 25(d), Federal Rules of Civil Procedure, that there is a substantial need for continuing the within action or that John Foster Dulles, successor to Dean G. Acheson, adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States;

3. That plaintiffs have never resided in the United States; and

4. That the Congress in enacting Section 903, Title 8, U.S.C.A., never intended that individuals asserting claims such as that asserted by plaintiffs herein, who have lived their lives as Chinese and who have never been in the United States, have the status and right to avail themselves of Section 903, Title 8, U.S.C.A.

Made and entered this 18th day of June, 1953.

/s/ JAMES ALGER FEE,
District Judge.

[Endorsed]: Filed June 18, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Henry L. Hess, United States Attorney for the District of Oregon, attorney for defendant:

Notice is hereby given that Lee Gwain Toy and Lee Gwain Dok, by Lee Ben Koon, their next friend, the plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Cir-

cuit from the judgment docketed and entered in this action on the 18th day of June, 1953, in favor of the defendant and against plaintiffs.

/s/ RODNEY W. BANKS,
Of Attorneys for Plaintiffs;

J. P. SANDERSON,
Of Attorneys for Plaintiffs.

Service of copy acknowledged.

[Endorsed]: Filed August 11, 1953.

[Title of District Court and Cause.]

BOND FOR COSTS

Know All Men by These Presents, That we, Lee Gwain Toy and Lee Gwain Dock by Lee Ben Koom, their next friend, and the American Surety Company of New York, as Surety, are held and firmly bound unto Dean G. Acheson, Secretary of State of the United States of America, his executors, administrators, or assigns, in the sum of Two Hundred Fifty & No/100 ($250.00) dollars, lawful money of the United States of America, to be paid unto the said Dean G. Acheson, Secretary of State of the United States of America, his executors, administrators, or assigns, to which payment well and truly to be made, we do bind and oblige our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of June, A.D. 1953.

Whereas, the above-named Lee Ben Koom heretofore is citizen of the State of Oregon commenced an action in the United States District Court, in and for the District of Oregon, against the said Dean G. Acheson, Secretary of State of the United States of America.

Now, Therefore, the Condition of This Obligation is such that if the above-named Lee Gwain Toy and Lee Gwain Dock by Lee Ben Koom in the said action shall pay on demand, all costs that may be adjudged, or awarded against them as aforesaid in said action; then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

/s/ LEE BEN KOON.

[Seal] AMERICAN SURETY COMPANY OF NEW YORK,

By /s/ JEAN D. SAUNDERS,
Res. Vice President.

Attest:

/s/ JEANNE SIEBEN,
Res. Asst. Secretary.

[Endorsed]: Filed August 11, 1953.

United States District Court, District of Oregon

No. Civil 6757—(Also: Civil Nos. 6751 and 6762)

LEE GWAIN TOY and LEE GWAIN DOK,
Plaintiffs,

vs.

DEAN ACHESON, etc.,
Defendant.

Portland, Oregon, April 20, 1953

Before: Honorable James Alger Fee,
Chief Judge.

Appearances:

RODNEY W. BANKS,
Of Counsel for Plaintiffs in Civil Nos. 6751, 6757 and 6762.

JAMES P. POWERS,
Of Counsel for Plaintiff in Civil No. 6753.

No appearance was made in Civil No. 6761.

VICTOR E. HARR,
Assistant United States Attorney,
Of Counsel for Defendant.

TRANSCRIPT OF PROCEEDINGS

Mr. Harr: As your Honor perhaps knows, these cases may be all considered together. They arise because of Title 8, Section 903 of the Code, that a person born of parents either one or the other residing in this country, their offspring born in a

foreign nation may appear before the American Consulate and make application for a passport to this country by virtue of derivative citizenship. That has been the procedure. There have been a number of cases filed up and down the Coast, and quite a number of them here, where an alleged Chinese father, a citizen of this country, has returned to China, has married and they have had offspring.

The Court: They always have boys, I understand.

Mr. Harr: That is generally the rule, your Honor. And they then make application to the American Consulate, at the nearest office, and ask for a travel document. That is the basis of these five cases now before your Honor.

I would like to preface my statement, your Honor, with this comment: That as to each of these five cases we have not received the Department of State file. The motion is predicated entirely upon the complaint as filed by the plaintiff.

Section 903 provides that if any person who claims a right or privilege as a national of the United States is denied such right and privilege he may file suit in the Federal District Court applying for citizenship, for an order of citizenship. The complaints in each of these five cases state that such applications were made to the Secretary of State Consul either at Canton, China, or Hongkong. And all the complaints further state that there was no rejection of the [2*] travel document,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

but that the Consulate officer, for reasons of his own, was dilatory and did not act upon the matter, and therefore they have the right to have the Court determine that they are citizens.

Now, I don't believe that they meet the test. I think in one instance the allegation is that an application was made in August of 1947 to the American Consul at Canton, China, and that the application was later transferred, at a later date, to Hongkong. Now, it would seem that they are rather old cases. I am not in possession of facts to explain why that delay. In another case an application was made at Hongkong in March of 1952, and they say that the Consulate officer should have acted upon it; in another case, February, 1952; another in July, 1952; and another one in September of 1951.

But I contend this, your Honor, and my motion is based upon Section 903 of the Code, that the Court has no jurisdiction to entertain these suits because there has been no denial by the Consulate officer.

Mr. Banks: If the Court please, I presume your Honor is familiar with Section 903 of the Nationality Act, which states that if any person who claims a right or privilege as a national of the United States is denied such right or privilege by any department or agency or executive officer thereof upon the ground that he is not a national of the United States, such [3] person, regardless of whether he is within the United States or abroad, may institute an action against the head of such department of the United States for the District of Columbia or

in the District Court of the United States for the District in which such person claims a permanent residence, for a judgment declaring him to be a national of the United States.

In two of these cases the application was made in Canton or Hongkong in the years 1947 and 1948. The Consul has allowed an unreasonable delay of all this time, and has never acted directly or indirectly on this, which we feel is a direct refusal to issue the certificate of identity to enable the son to come over here to be heard in his trial. They might have long gray beards before the Consul would act over there, and we feel that they have a right to have their cases heard here upon the merits, and if it is proved that they are sons of these citizens they are American citizens. Their rights are being jeopardized because of the Consul's failure to act for, in several of these, a period of four or five years, there has been no word heard from them.

I don't believe Counsel has cited any cases directly in point. We have some cases that indicate that this dilatory action on the part of the Consul amounts to a denial. If your Honor cares to hear some of those cases—they are not directly in point, but they do indicate that the Consul must take some action within—— [4]

The Court: You agree that the method that has been used in absentia has been that of following the administrative procedure first.

Mr. Banks: Since 1940, since this act, you mean, your Honor?

The Court: No, I mean for 50 years before that.

Mr. Banks: I am not too familiar with how they operated before.

The Court: I am.

Mr. Banks: That is, before the act.

The Court: I am. I don't think that they intended to change that myself. I think that these proceedings are supposed to go through the administrative boards here and then go to the Court of Appeals. That is the normal course, and has been ever since I can remember.

Mr. Banks: I know most of the cases have been in San Francisco and Seattle. There have just been a few here. Since 1940 it seems that the Courts have entertained these cases under this section.

The Court: I never have. I don't know of any binding authority. There is no authority in the Ninth Circuit.

Mr. Banks: Except the wording of this Section 903, whatever interpretation might be placed on it.

The Court: Yes. But that is what I say, I think the procedure has always been otherwise. I don't think that the act [5] was intended to change the procedure myself.

Mr. Banks: I guess there have been several hundred cases filed under it, and several cases appealed under this section, too. But I don't believe that question has ever come up on them.

The Court: Most of the cases that have been appealed have been the Japanese cases, which is an entirely different situation, as I understand it.

Mr. Banks: I can't answer that. It is according to how the Court's view of this section is.

The Court: As I say, I don't see any reason to reverse the procedure, and I don't think that this was intended to give the Court that right.

Mr. Banks: Of course, I don't want to argue with your Honor. It just says in the section——

The Court: You don't know the history.

Mr. Banks: Possibly not.

The Court: That is what I said. I know the history for 50 years. It has been a different type of procedure. It seems to me that if Congress wanted to change that Congress would have said so.

Mr. Banks: I don't know the history, but I just know this section, and it seems to me that this section would be clear as to what a person's rights would be under that situation.

The Court: You admit there is no denial. [6]

Mr. Banks: No official denial. But they have waited for four and five years. We feel that that is tantamount to a denial.

The Court: I don't see that, either. And at the present time you have not made any motion to substitute somebody for Acheson?

Mr. Banks: Yes, I did, your Honor. It probably is not in the file, but I did that last week.

The Court: All right. I think that that is a better ground to go on than the other, because, as I understand it, in that you have to indicate that there is a proper ground, and that is why I think I will deny the motions and dismiss the cases on that ground.

Mr. Banks: Dismiss the case on the substitution, you mean?

The Court: Yes, on the ground that substitution cannot be made at present under the statute.

Mr. Banks: I have an associate here that might wish to say something. He has a case.

Mr. Powers: Your Honor, I don't believe that there is anything I could add. Our procedure was under this Section 903, which we contend allows anybody whose rights as an American citizen have been denied by in this case the Consul abroad to bring this action. Our theory in this particular case is that even though there has been no official denial by the Consult, he has refused to act at all, or at least has not acted at all [7] for an unreasonable length of time, and therefore that is tantamount to a denial of the rights of these plaintiffs. And under the section of the Code that is involved here they have a right to bring a case in the District Court where they claim permanent residence, which has been done in this case. It seems to me that if the statute is going to be construed to mean that that denial has to be an official denial, the Consul by simply refusing to decide any particular case would absolutely make this section of the Code a nullity and no proceeding could ever be brought under it. That is the position in the case which I represent, which is only one of the cases.

The Court: Has your man ever been in the United States?

Mr. Powers: You mean the sons? No, they never have, your Honor.

The Court: How can he claim residence?

Mr. Powers: Through the father, your Honor. His father is a resident here.

The Court: I don't think that this section was ever intended for that sort of a maneuver. I don't think he has any residence here.

Mr. Powers: All we are attempting to do, your Honor, is get a judicial trial so that the Court can determine the question.

The Court: I know, but he has never been here. How can he be a resident? [8]

Mr. Powers: I believe he is entitled to claim a residence in this country. Being a minor it would be through his father.

The Court: Not if he never has been here.

Mr. Harr: There was a recent case, your Honor —perhaps your Honor has read it. I think it was decided in January by Judge Goodman. He comments along the lines your Honor has commented, that in his opinion Section 903 was never intended to cover situations of this kind. He stated that it was his opinion that 903 was intended to cover those cases where people had perhaps expatriated themselves by some conduct. And you will note that 903 follows Sections 901 and 902, and 901 and 902 cover such instances as people living abroad who have lost their citizenship. Those were people who had already had citizenship, and this was a procedure set up by Congress to deal with those cases rather than with these foreign-born people.

Mr. Powers: That is all I can say on the subject, your Honor.

The Court: In each of these cases have motions to substitute been filed?

Mr. Banks: Yes, your Honor.

Mr. Powers: I don't believe that is true in my case. No, it has not in my case.

Mr. Harr: I believe just in those cases that Mr. Banks represents have motions been filed.

The Court: In any one of these cases has the person ever [9] been in the United States? In any of your cases?

Mr. Banks: No, your Honor.

Mr. Harr: I notice there is one more case, and I wasn't aware of this when I first addressed the Court. Mr. Maurice Corcoran is attorney in one of the cases here. I thought Mr. Banks represented them all, but I see Mr. Corcoran is the attorney in the Chee case. I don't believe he is in court.

The Court: What is your case? Is that the Ming case?

Mr. Powers: That is the Ming case, 6753, your Honor.

Mr. Harr: I believe Maurice Corcoran is in 6761, Chee.

The Court: In 6751, Yeau vs. Acheson; 6757, Toy vs. Acheson, and 6762, Gay vs. Acheson, the motions to substitute are denied, and in each case the case is dismissed because the statutory requirement of a motion to substitute cannot be performed, it having been stated in the record that the plaintiff has never been a resident of the United States.

In the Ming case, there being no motion to substitute, the cause is dismissed for failure to file such

a motion to substitute, and likewise it is dismissed upon the ground set out in the motion, it being admitted in this record that Ming has never been actually within the limits of the United States.

The Chee case is dismissed for failure to prosecute.

(Whereupon proceedings in the above matters on said day were concluded.) [10]

REPORTER'S CERTIFICATE

I, John S. Beckwith, hereby certify that I am an official court reporter for the United States District Court, District of Oregon; that as such official court reporter I reported in shorthand the proceedings had in the above-entitled matters on April 20, 1953; that thereafter I prepared a typewritten transcript from my shorthand notes, so taken, of said proceedings, and that the foregoing transcript, pages 1 through 10, inclusive, constitute a full, true and correct transcript of said proceedings, so taken by me in shorthand on said day.

Dated this 25th day of August, 1953.

/s/ JOHN S. BECKWITH,
Official Court Reporter.

[Endorsed]: Filed June 10, 1953.

United States District Court, District of Oregon

No. Civil 6752—(Also Civil No. 6622)

LEE WING GUE, by His Father and Next Friend, LEE SUN YUE,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Defendant.

Portland, Oregon, April 27, 1953

Before: Honorable James Alger Fee,
Chief Judge.

Appearances:

RODNEY W. BANKS,
Of Attorneys for Plaintiffs.

VICTOR E. HARR,
Assistant United States Attorney,
Of Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS

Mr. Banks: In these cases the plaintiff has filed a motion to make substitution of Dulles for Acheson. I don't believe that the United States Attorney has filed a motion to dismiss in this case as he did in the others that we heard the other day. However, in view of your Honor's rulings in those other cases I presume that you will dismiss these cases upon my motions to substitute.

However, I do wish to say that in the Chew case the Consul has made an official denial of the plaintiff's application, but as I understand you are not taking that into consideration in your ruling. It is based primarily that we do not have the right to substitute.

The Court: In each of these instances has the plaintiff ever been in the United States?

Mr. Banks: No, your Honor.

The Court: They are the same situation?

Mr. Banks: The same situation.

The Court: Thank you.

Mr. Harr: Your Honor, when I filed those other motions that came on a week ago I thought in each of these cases that the American Consul had denied the application for passport, and I didn't know until this morning that in one of the cases they had not made such a denial. In that particular case, No. 6752, I would like to add that as an additional ground: That it shows on the face of the complaint that the rights have not been denied plaintiff and therefore it is improperly brought.

The Court: Yes. I will deny the motions to substitute.

Mr. Harr: Your Honor, should the order also incorporate the language that the plaintiffs not having resided in the United States the Nationality Act does not apply?

The Court: Yes, it should have that language. That was counsel's statement in court.

(Whereupon proceedings in said matters on said day were concluded.)

Reporter's Certificate

I, John S. Beckwith, hereby certify that I am an official court reporter for the United States District Court, District of Oregon; that as such official court reporter I reported in shorthand the proceedings had in the above-entitled matters on April 27, 1953; that thereafter I prepared a typewritten transcript from my shorthand notes, so taken, of said proceedings, and that the foregoing transcript, pages 1 and 2, constitute a full, true and correct transcript of said proceedings, so taken by me in shorthand on said day.

Dated this 25th day of August, 1953.

/s/ JOHN S. BECKWITH,
Official Court Reporter.

[Endorsed]: Filed August 25, 1953.

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents numbered from 1 to 15, inclusive, consisting of Complaint, Answer, Motion to dismiss; Motion for substitution of party defendant; Affidavit in support of motion for substitution of party defendant; Notice of motion; Order dated April 20, 1953; Memorandum opinion; Order dated June 18, 1953; Order of dismissal dated June 18, 1953; Notice of appeal; Bond

on appeal; Plaintiff-appellant's designation of record on appeal, etc.; and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 6757, in which Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon are appellants and plaintiffs and Dean G. Acheson, Secretary of State of the United States of America is appellee and defendant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellants, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal is $5.00 and that the same has been paid by the appellants.

I further certify that there is also enclosed a copy of the Transcript of Proceedings dated April 20, 1953.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said District this 14th day of September, 1953.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: Nos. 14030, 14031, 14032, 14033, 14034. United States Court of Appeals for the Ninth Circuit. Lee Gwain Toy and Lee Gwain Dok, by Their Father and Next Freind Lee Ben Koon, Appellant, vs. Dean G. Acheson, Secretary of State of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed September 16, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14033

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend LEE BEN KOON,

Appellants,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANTS WILL RELY ON APPEAL

Appellants having filed their notice of appeal from the order made and entered in the District

Court of the United States for the District of Oregon, on June 18, 1953, and having designated the record to be included on appeal in this Court, hereby file their statement of points on which they intend to rely upon appeal, as follows:

1. That the trial court erred in denying appellants' timely motion to substitute John Foster Dulles, Secretary of State of the United States as party defendant for and in place of Dean G. Acheson.

2. That the trial court erred in dismissing the within cause on the ground that the Department of State, through its consulate officer, has never denied appellants' application for entry into the United States.

3. That the trial court erred in dismissing said cause on the ground that appellants had never resided in the United States of America.

4. That the trial court erred in dismissing said cause on the ground that Section 903, Title 8, U. S. C.A., never intended that individuals asserting claims such as that asserted by plaintiffs herein, who have lived their lives as a Chinese and who have never been in the United States, have the status and right to avail themselves of Section 903, Title 8, U.S.C.A.

RODNEY W. BANKS,

J. P. SANDERSON,

By /s/ RODNEY W. BANKS,

Attorneys for Appellants.

Receipt of copy herein accepted this 29th day of September, 1953.

HENRY L. HESS,
United States Attorney for the District of Oregon,

By /s/ VICTOR E. HARR,
Assistant United States Attorney.

[Endorsed]: Filed September 30, 1953.

In the United States Court of Appeals
for the Ninth Circuit

No. 14033

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend LEE BEN KOON,

No. 14030

WOO CHIN CHEW, by His Father and Next Friend WOO YUEN PAK,

No. 14031

JOONG TUNG YEAU, by His Brother and Next Friend JOONG YEAU HING,

No. 14032

LEE WING GUE, by His Father and Next Friend LEE SUN YUE,

No. 14034

LOUIE HOY GAY, by His Father and Next Friend LOUIE FOO,

Appellants,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Appellee.

STIPULATION FOR CONSOLIDATION OF ABOVE ENTITLED CAUSES FOR HEARING ON APPEAL

It is Hereby Stipulated and Agreed by and between the parties to the above-entitled causes, by and through their respective attorneys, that subject to the approvel of this Court said causes be consolidated for hearing and determination in the above-entitled Court.

It is Further Stipulated and Agreed that the printed transcript of record in Case No. 14033, Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon, appellants, vs. Dean G. Acheson, Secretary of State of the United States of America, appellee, may be used and considered as the printed transcript of record in the other above causes and that the printing of a transcript of record in said other causes may be dispensed with.

It is Further Stipulated and Agreed that the statement of points in said Case No. 14033, Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon, appellants, vs. Dean G.

Acheson, Secretary of State of the United States of America, appellee, embraces all of the statement of points which the appellant is filing with this Court in each of the above other causes.

It is Further Stipulated and Agreed that in the determination of each of the above causes the United States Court of Appeals for the Ninth Circuit may consider the original record in each of the causes to be consolidated in their original form as exhibits herein without the necessity of their being printed as part of the transcript of record herein, save and except the record in Case No. 14033, Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon, appellants, vs. Dean G. Acheson, Secretary of State of the United States of America, appellee, which will be printed as aforesaid.

It is Further Stipulated and Agreed that there has been prepared and forwarded herewith to the United States Court of Appeals for the Ninth Circuit for filing a statement of points in each of said causes, which said statements by this reference are incorporated herein as a part of this stipulation, and that in the determination of each of the within causes the United States Court of Appeals for the Ninth Circuit may consider said points in their original form without the necessity of their being printed, save and except the printing of the statement of points in said Case No. 14033, Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon, appellants, vs. Dean G.

Acheson, Secretary of State of the United States of America, appellee.

It is Further Stipulated and Agreed that it is the opinion of the undersigned that the questions of law and fact embodied in these causes sought to be consolidated are closely identical and can be adequately presented by a transcript of record in Case No. 14033, Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon, appellants, vs. Dean G. Acheson, Secretary of State of the United States of America, appellee, and a consolidated brief therein.

It is Further Stipulated and Agreed that this stipulation be printed and made a part of the printed transcript of record in Case No. 14033, Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon, appellants, vs. Dean G. Acheson, Secretary of State of the United States of America, appellee.

Dated this 28th day of September, 1953, at Portland, Oregon.

RODNEY W. BANKS,

J. P. SANDERSON,

Attorneys for Appellants.

By /s/ RODNEY W. BANKS.

HENRY L. HESS,

United States Attorney for the District of Oregon,

By /s/ VICTOR E. HARR,
Assistant United States Attorney.

So Ordered:

/s/ ALBERT LEE STEVENS,
Acting Chief Judge.

/s/ WM. HEALY,

/s/ HOMER T. BONE,
United States Circuit Judges.

[Endorsed]: Filed October 1, 1953.

In the United States Court of Appeals
for the Ninth Circuit

No. 14033

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend LEE BEN KOON,

No. 14030

WOO CHIN CHEW, by His Father and Next Friend WOO YUEN PAK,

No. 14031

JOONG TUNG YEAU, by His Brother and Next Friend JOONG YUEN HING,

No. 14032

LEE WING GUE, by His Father and Next Friend LEE SUN YUE,

No. 14034

LOUIE HOY GAY, by His Father and Next Friend LOUIE FOO,

Appellants,

vs.

DEAN G. ACHESON, Secretary of State of the United States of America,

Appellee.

No. 13963

CHIN CHUCK MING and CHIN CHUCK SANG, by Their Next Friend and Father, CHIN AH POY,

Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellee.

STIPULATION CONSOLIDATING CAUSES FOR BRIEF AND HEARING

It is Hereby Stipulated and Agreed by and between the parties to the above-entitled causes, by and through their respective attorneys, that subject to the approval of this court said causes be consolidated for hearing and determination in the above-entitled court.

It is Further Stipulated and Agreed that a stipulation has been entered into heretofore in the cases of:

No. 14033

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend LEE BEN KOON,

No. 14030

WOO CHIN CHEW, by His Father and Next Friend WOO YUEN PAK,

No. 14031

JOONG TUNG YEAU, by His Brother and Next Friend JOONG YUEN HING,

No. 14032

LEE WING GUE, by His Father and Next Friend LEE SUN YUE,

No. 14034

LOUIE HOY GAY, by His Father and Next Friend LOUIE FOO,

Appellants,

vs.

DEAN ACHESON, Secretary of State of the United States of America,

Appellee.

the terms and provisions of which Stipulation are incorporated herein by reference and made a part hereof.

It is Further Stipulated that it is the opinion of the undersigned that the questions of law and fact

embodied in all of the above-entitled causes, including the cause of:

No. 13963

CHIN CHUCK MING and CHIN CHUCK SANG, by Their Next Friend and Father, CHIN AH POY,

Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellee.

are closely identical and can be adequately presented by a transcript of record in case No. 14033 (Lee Gwain Toy and Lee Gwain Dok, by their father and next friend Lee Ben Koon), and the other records and files provided for in said stipulation above referred to, and in addition the transcript of record in case No. 13963 (Chin Chuck Ming and Chin Chuck Sang, by their next friend and father Chin Ah Poy) in the determination of said case, and a consolidated brief therein covering all of the above-entitled causes.

It is Further Stipulated and Agreed, pursuant to the approval of the above-entitled court, that the time for the filing of the Appellants' Brief in said case No. 13963 be extended to the time of the filing of the consolidated brief covering all of said cases hereinabove mentioned.

Dated this 28th day of September, 1953, at Portland, Oregon.

RODNEY W. BANKS,

J. P. SANDERSON,

Attorneys for Appellants in Cases Nos. 14033, 14030, 14031, 14032 and 14034.

By /s/ RODNEY W. BANKS.

JOSEPH & POWERS,

Attorneys for Appellants, Chin Chuck Ming and Chin Chuck Sang,

By /s/ JAMES P. POWERS.

HENRY L. HESS,
United States Attorney for the District of Oregon,

By /s/ VICTOR E. HARR,
Assistant United States Attorney.

So Ordered:

/s/ ALBERT LEE STEVENS,
Acting Chief Judge.

/s/ WILLIAM HEALY,
United States Circuit Judge.

[Endorsed]: Filed October 1, 1953.

No. 14035

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DWIGHT RICHARD BUTTERFIELD,
Petitioner-Appellant,

vs.

FRED T. WILKINSON, Warden,
United States Penitentiary,
McNeil Island, Washington,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

HONORABLE EDWARD P. MURPHY, *Judge*
Sitting by Assignment

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney
Attorneys for Appellee

Office and Post Office Address:
324 Federal Building
Tacoma 2, Washington

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

HONORABLE EDWARD P. MURPHY, *Judge*
Sitting by Assignment

BRIEF OF APPELLEE

STATEMENT OF PLEADINGS AND FACTS

Appellant on January 10, 1953, lodged with the Clerk of the United States District Court for the Western District of Washington, Southern Division, his petition for a writ of habeas corpus, praying to be released from imprisonment in the above named insti-

tution, for the alleged reason that his several sentences mentioned therein were and should be considered concurrent and that having served the greater in length he should be released from imprisonment. (R. 1-35).

To the Writ of Habeas Corpus issued on April 6, 1953, returnable April 11, 1953, appellee served and filed his Motion to Dismiss on April 10, 1953, together with his memorandum in support thereof. (R. 36-45).

Thereafter on return day, April 11,1953, the appellant herein being represented by Harry Sager, counsel appointed by the Court, and counsel for the respondent being present, the Court heard the argument of respective counsel upon the issues of law herein raised by respondent's motion, and having determined there was no necessity for taking testimony, took the matter, as submitted, under advisement, (R. 46-70), and in the meantime remanding appellant to the custody of the warden.

Thereafter, on April 22, 1953, the Judge of the District Court made and signed a memorandum opinion on the legal issues involved and an order included therewith discharging the writ, which memorandum opinion and order was filed with and entered by the Clerk of the Court on April 25, 1953 (R.71-72).

Thereafter on May 11, 1953, appellant filed his Motion for Rehearing (R. 73-81), which was denied by Order of the Court dated May 14, 1953, and entered May 18, 1953. (R.82).

From the final order made April 22, 1953, the appellant has been permitted to appeal. (R. 83-86).

The facts material to a determination of appellant's right to discharge from present confinement, as disclosed in the record (R. 71), may be summarized as follows:

On September 26, 1949, appellant pleaded guilty to a violation of Title 18 U.S.C., Section 2312, and was sentenced in the United States District Court for the District of New Mexico to three years imprisonment. On the same date, appellant pleaded guilty in the same court to a violation of Title 18 U.S.C., Section 751 and was sentenced to two years imprisonment, the sentence reading: "Two (2) years, said prison sentence imposed to begin and run consecutively with the prison sentence of three (3) years this day imposed against said defendant in Cause No. 15107 on the Criminal Docket of this Court." On October 26, 1949, appellant was sentenced to two years imprisonment by the United States District Court for the Northern District of Texas, Amarillo Division, for another violation of Title 18 U.S.C.,

Section 751, the sentence reading: "* * * two years, said sentence to be cumulative with sentence in other cases." Having served his three year sentence in full, appellant sought his release from McNeil Island Penitentiary where he was at the time thereof confined, contending that both two year sentences imposed on him must be interpreted to run concurrently with the three year sentence already served.

QUESTION PRESENTED

Where appellant received two sentences, the second providing it was to begin and run consecutively with the first, does the determination of the corrected meaning of whether said sentences are to be served concurrently or consecutively come within the province of a habeas corpus court?

ARGUMENT AND AUTHORITIES

Title 28 U.S.C., Section 2255, in pertinent part here, provides:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court

which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

* * *

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, Section 114, 63 Stat. 105."

The above law of procedure became effective September 1, 1948. Prior to its enactment this Court

in the case of *Bledsoe v. Johnston*, 154 F. (2d) 458, had affirmed the District Court's decision in *Bledsoe v. Johnston*, 61 F. Supp. 707.

At page 708 of the latter, it is stated:

> "It is the contention of petitioner that the sentences as set forth in the minute order and the judgments and commitments were to run concurrently, and therefore there was nothing for the Texas District Court to correct. I think, and so held in *Bledsoe v. Johnston*, 58 F. Supp. 129, supra, that the record produced an ambiguity, and that it was proper that it be corrected to show the truth; that is, *the actual sentences imposed orally in the presence of petitioner. Buie v. United States*, 5 Cir. 127 F. (2d.) 367; *Downey v. United States*, 67 App. D.C. 192, 91 F. (2d) 223." (Emphasis ours.)

The foregoing is an answer to the argument of opposing counsel below, namely, that appellant's sentences were valid concurrent sentences. (R. 55-58, 67-69.)

The District Court in Bledsoe's first application, *Bledsoe v. Johnston*, 58 F. Supp. 129, at page 131, had decided:

> "The sentences here are ambigious and should be corrected to show whether they are to run concurrently or consecutively. The language of the commitments in each case reads 'consecutive with' the sentence imposed this day. A sentence is not 'consecutive with,' it is 'consecutive to' another sentence. Consecutive means successive,

following in a regular train; succeeding one another in regular order. Webster's New International Dictionary. The preposition 'with' is correctly used in the phrase 'concurrent with,' which is the way that it is used in the docket entry. Furthermore, it cannot be determined in this case which sentence is to follow which.

"Since, by the test of reasonableness, it cannot be determined what the intent of the trial court was, I am constrained to hold that in conformity with the rule mentioned in Re Bonner, 151 U.S. 242, 261, 14 S. Ct. 323, 38 L. Ed. 149, the discharge of the petitioner will be delayed and he will be remanded to the United States District Court for the Eastern District of Texas, Paris Division, for further action by that Court."

The foregoing should correct the erroneous conception appearing at page 67 of the Record to the effect that the Bledsoe sentences were corrected before the habeas corpus petition was filed. (R. 67-69). Two petitions were filed, and the correction was made after the first filing and remanding, as stated in the appellate decision at page 459:

"However, here Bledsoe was returned to the District Court for the Eastern District of Texas and a hearing was had for correction of the judgments before the same judge who signed the sentences on December 11, 1939. Evidence was there introduced of the docket sheets kept by both the clerk and the judge at the time the sentences were pronounced. They were all made on December 11, 1939, and show a sentence of five years in case No. 1335, and of five years cumulative in case No. 1166. Upon this docket

> sheet evidence the judgment in No. 1335 was amended to read for a sentence of five years and the judgment in No. 1166 for five years to run 'consecutive to the sentence for five years in criminal No. 1335.' "

The enactment of Title 28, U.S.C., Section 2255, afforded a procedure in such instances of correction of ambiguous sentences, which not only rendered the application to a habeas corpus court and the resulting remand to the sentencing court unnecessary, but which made its procedure by motion exclusive, in such instance, without resort to habeas corpus.

See *Jones v. Squier*, 195 F. (2d) 179; *Winhoven v. Swope*, 195 F. (2d) 181.

Counsel below for appellant would place the obligation of construing ambiguous sentences upon the Warden in order to by-pass the effect of Section 2255. (R. 57)

While it might be generally true that habeas corpus would lie only where the applicant was entitled to release, and such did not arise in this instance until the three year sentence was served, still that would not have prevented a motion under Sec. 2255 when that section expressly declares such "motion * * * may be made at any time." See in this connection *Holloway v. United States*, 191 F. (2d) 504, 507.

This motion is not to be confused with any motion under the criminal rules of the Court. Nor does the law declare that the motion must be made at the time of imposition of sentence or that it cannot be made after service of another sentence. As stated in *Barrett v. Hunter*, 180 F. (2d) 510 514:

> "The grounds for a motion to vacate, (set aside or correct the sentence), under Sec. 2255, encompass all of the grounds that might be set up in an application for a writ of habeas corpus predicated on facts that existed *at* or prior to *the time of the imposition of sentence.*" (Emphasis ours.)

Counsel below would appear to contend that the ambiguity of the second sentence never arose until the Warden construed it as requiring further imprisonment, (R. 57), and as a consequence it cannot be said to parallel "an application for a writ of habeas corpus predicated on facts that existed at or prior to the time of the imposition of sentence."

However, prior to making such contention counsel below was engaged (R. 50-54) in discussing the meaning of "consecutively with" and the intention of the sentencing court in the use of such terms, which were certainly "facts that existed at or prior to the time of the imposition of sentence." And the fact that the Warden placed upon them one construction and

the appellant another did not postpone their ambiguity until such moment.

There is a reasonable conflict of rulings in the construction of such terms as "consecutively with" or "consecutive with", as shown by the various decisions.

> See *Hiatt v. Ellis*, 5th Cir., 192 F. (2d) 119;
> *Boyd v. Archer*, 9th Cir., 42 F. (2d) 43;
> *Gillenwaters v. Biddle*, 8th Cir., 18 F. (2d) 206;
> *Waldon v. United States* (E.D. Ill.) 84 F. Supp. 449.

In the foregoing cases the word "consecutive" or "consecutively" with or without the proper preposition appears to be sufficient to identify the sentence in question as to be served consecutively to the other referred to, but in the following cases the preposition "with" was held to do violence to the meaning of consecutiveness:

> *Bledsoe v. Johnston*, 9th Cir., 154 F. (2d) 458;
> *U. S. ex rel Chasteen v. Denemark*, 7th Cir., 138 F. (2d) 289.

In the light of such conflict and if the burden of construction was placed on the warden, as counsel below for appellant has suggested, the Government would be placed in the strange position of freeing or imprisoning persons so sentenced, pursuant to the nature of construction placed upon such terms by the courts in the particular circuit wherein the place of

confinement was located and to which persons thus sentenced were transported for imprisonment.

CONCLUSION

For the reasons hereinabove stated, it must be contended that the decision below should be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

GUY A. B. DOVELL
Assistant United States Attorney
Attorneys for Appellee

No. 14037

United States
Court of Appeals
for the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellant,

vs.

TILLIE MELY, as Administratrix of the Estate of A. E. Mely, Deceased,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-20-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CANNON, McKEVITT & FRASER,
711 Old National Bank Building,
Spokane, Washington;

VERNER R. CLEMENTS,
Weisgerber Building,
Lewiston, Idaho,

Attorneys for Appellant.

MAURY, SHONE & SULLIVAN,
33 Hirbour Building,
Butte, Montana;

PAUL W. HYATT,
205 Weisgerber Building,
Lewiston, Idaho,

Attorneys for Appellee.

United States District Court for the District of Idaho, Central Division

No. 1862

TILLIE MELY, as Administratrix of the Estate of A. E. Mely, Deceased,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

COMPLAINT

Plaintiff, for claim and demand against defendant, alleges:

1.

This action is brought under the Federal Employer's Liability Act, 45 U. S. C. A., Sec. 51 et seq., for damages arising from the death of A. E. Mely.

By order of court duly given and made Tillie Mely was, on the 7th day of December, 1951, duly and regularly appointed Administratrix of the Estate of A. E. Mely, deceased, by the Superior Court of the State of Washington, in and for the County of Spokane, and thereafter, and in accordance with said order so appointing her, she duly qualified as such administratrix, and on the 7th day of December, 1951, she received her Letters of Administration of said estate, and ever since said time she has been, and now is, the duly appointed, qualified and acting administratrix of the Estate of

A. E. Mely, deceased, and her Letters of Administration have never been revoked.

2.

During all of the times herein mentioned, the defendant, Northern Pacific Railway Company, was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and was and is a common carrier by railroad of freight and passengers, and owns and operates in Interstate Commerce a railroad situated between the cities of Lewiston, Idaho, and Spokane, in the State of Washington, and said defendant at all times herein material was doing business at the commencement of this action at Arrow, in the State of Idaho.

3.

Defendant, long prior to November 11, 1951, and on said date, employed plaintiff's decedent as an engineer on its locomotives, and on said 11th day of November, 1951, plaintiff's decedent was employed as engineer on a Diesel locomotive to work on freight trains loaded and unloaded with freight, and being shipped and received by defendant in Interstate Commerce, and on or about November 11, 1951, while plaintiff's decedent was still an employee of the defendant as such engineer, at about the hour of 11:15 o'clock a.m., and at the time A. E. Mely was killed, as hereinafter alleged, his said duties as such employee of defendant were in furtherance of Interstate Commerce between the cities of Lewiston, Idaho, and Spokane, Washington, and his said

duties did, as such employee and engineer, in many ways directly or closely and substantially affect such commerce as above set forth.

At all times herein mentioned defendant owned and maintained the railroad tracks, the railroad bed, and the railroad right-of-way upon which the collision hereinafter mentioned occurred, and all persons working upon, in, or about the engine and train which plaintiff's decedent was operating, and the engine and train with which the collision hereinafter mentioned occurred, were all servants, employees and agents of the defendant company. Plaintiff's decedent was the engineer of the Northern Pacific Railway Company's engine No. 6015 going east, and it collided with a train of cars being hauled by the Northern Pacific Railway Company's engine No. 1648 going East.

4.

That on November 11, 1951, at about the hour of 11:15 a.m., plaintiff's decedent, as engineer of defendant's engine No. 6015, while acting in the course and scope of his employment with defendant Company, and while said engine and train being so operated by him, which had the right-of-way, and was a through train, approached the station of Arrow Junction in the State of Idaho, the defendant, by and through its servants, employees and agents, on defendant's train No. 1648 going East, and while they were acting within the course and scope of their employment with defendant Company, and in pursuance of their duties incident thereto,

negligently caused, allowed and permitted train No. 1648 going East to stop on a sharp, blind curve on the main line track for more than 45 minutes during switching operations, where its view by plaintiff's decedent was obstructed, and thereby, and because of the negligent acts of commission and omission, in whole or in part, of defendant, its servants, agents and employees, and by reason of defects and insufficiencies, due to defendant's negligence in its cars, engines, appliances, machinery, track and road bed, train No. 6015 crashed into, and collided with the rear end of train No. 1648, and thereby A. E. Mely was killed.

5.

The negligence of defendant consisted of the following acts, to wit:

(1) Failure to provide A. E. Mely a safe place to work.

(2) Failure to provide and supply proper, safe and adequate equipment.

(3) Running and operating train No. 6015 on its line without a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train could control its speed without requiring brakemen to use the common hand-brake for that purpose.

(4) Running and operating train No. 6015 on its line without coupling the air-hoses.

(5) Running and operating train No. 6015 on

its line without connecting the air between engine No. 6015 and the cars following in said train.

(6) Instructing engineers on its line to disregard Company rules while proceeding through station yards.

(7) Compelling engineers on its line to proceed according to time schedules, regardless of Company rules.

(8) Allowing train No. 1648 to stop on a sharp, blind curve for switching purposes, well knowing the schedule and exact arrival of train No. 6015 at the place where the collision occurred.

(9) Failure to provide and equip its railroad system at the place of collision with a signal block system to warn plaintiff's decedent of the voluntary obstruction ahead, as herein alleged.

(10) Failure to give A. E. Mely any warning of any kind whatsoever of the obstruction and danger ahead, as herein alleged.

(11) Failure to place men, flares, or signals to give warning of said obstruction of said track a reasonable distance from said obstruction, so that A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision.

(12) Failing to properly protect train No. 1648 while it was in such obscure position aforesaid, and in failing to properly protect train No. 6015 from colliding therewith, by notice, signal, warning, flares, orders, or any other kind of notice sufficient to warn

A. E. Mely of the obstruction of said main line track.

6.

That the said A. E. Mely at the time of his death was fifty-five years of age, and his wife, for whose benefit this action is brought, was at the time of the death of her husband fifty-one years of age; that A. E. Mely had an expectancy of life of 21 years, and his wife, for whose benefit this action is brought, at the time of her husband's death, had a life expectancy of 27 years; that at the time of his death, A. E. Mely had an expectancy of life of 21 years, and earning, and capable of earning the sum of Five Hundred ($500) Dollars to Five Hundred Fifty ($550) Dollars per month, and from his said monthly earnings he contributed monthly to his wife, for whose benefit this action is brought, for her support, and for her maintenance, the necessary sum of Two Hundred ($200) Dollars per month, and she was his sole and only heir and beneficiary; that at all times during the married relation between A. E. Mely and his wife, for whose benefit this action is brought, the said A. E. Mely gave to his said wife financial support, and the best of care, comfort and society and companionship, and each was very affectionate one toward the other, and their lives while living together were constantly filled with happiness, comfort and companionship; that by reason of the death of A. E. Mely, his widow, for whom this action is prosecuted, has been entirely deprived of all financial support, and has suffered great loss of the comfort, society and companionship which she was receiving from her

said husband. That by reason of the death of the said A. E. Mely, the plaintiff herein has been compelled to, and has incurred funeral expenses for the burial of her husband of the reasonable and necessary value of Eleven Hundred ($1,100.00) Dollars.

7.

That by reason of the negligent acts of the defendant, its servants, agents, and employees, and as a direct or contributory proximate result thereof, in whole or in part, this plaintiff, for the benefit of the widow of the said A. E. Mely, deceased, has been, and now is, damaged by defendant in the sum of Thirty-five Thousand ($35,000) Dollars, no part of which has ever been paid.

Wherefore, plaintiff prays judgment against the defendant for the sum of Thirty-five Thousand ($35,000) Dollars, and for her costs of suit herein expended.

MAURY, SHONE &
SULLIVAN,

By /s/ A. G. SHONE,

/s/ PAUL W. HYATT,
Attorneys for Plaintiff.

[Endorsed]: Filed June 12, 1952.

[Title of District Court and Cause.]

ANSWER

For its answer to the complaint of plaintiff the defendant admits, denies and alleges as follows:

I.

Defendant admits paragraphs I, II and III of said complaint.

II.

Answering paragraph IV of said complaint, defendant denies each and every matter and thing therein contained.

III.

Answering paragraph V of said complaint, defendant denies each and every matter and thing therein contained.

IV.

Answering paragraph VI of said complaint, defendant has no knowledge or information sufficient to form a belief as to the matters and things therein contained and therefore denies the same.

Further answering said paragraph, defendant specifically denies that as the result of any negligent act on the part of said defendant the plaintiff has incurred the expense therein referred to in the sum of $1,100.00 or any sum whatsoever.

V.

Answering paragraph VII of said complaint, defendant denies each and every matter and thing therein contained, and specifically denies that as

the result of any negligent act on the part of said defendant the plaintiff has been damaged in the sum of $35,000.00 or any sum whatsoever.

Further answering said complaint and by way of an Affirmative Defense thereto defendant alleges as follows:

I.

That the death of A. E. Mely was caused and brought about solely and alone through the negligence of the said A. E. Mely, which negligence was the direct and proximate cause of his death.

Wherefore, defendant having fully answered prays that this action be dismissed and that it have and recover its costs necessarily expended herein.

CANNON, McKEVITT &
FRASER,

By /s/ F. J. McKEVITT,

/s/ VERNER R. CLEMENTS,
Attorneys for Defendant.

Service of Copy acknowledged.

[Endorsed]: Filed August 14, 1952.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED INSTRUCTION No. 6

The defendant has introduced in evidence what is designated as Rule 93 of the Consolidated Code of Operating Rules and General Instructions:

> "Within yard limits, second and inferior class, extra trains and engines must move at restricted speed."

The defendant has also introduced in evidence the following definition set forth in the Consolidated Code of Operating Rules and General Instructions:

> "Restricted Speed—Proceed prepared to stop short of train, obstruction, or anything that may require the speed of the train to be reduced."

I instruct you that said rule was in force and effect at the time Engineer Mely was operating Engine No. 6015 and that said rule was promulgated for the safety of Engineer Mely, his fellow employees, and the public.

I further instruct you that in the operation of Engine No. 6015, it was the duty of plaintiff's decedent, A. E. Mely, the engineer, to abide by this rule and to operate his engine in accordance therewith.

I further instruct you that if you find from the evidence that Engineer Mely violated this rule, then he was guilty of negligence.

If you find from the evidence that such negligence was the sole and proximate cause of his death, then your verdict should be for the defendant.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find for the plaintiff, and against the defendant, and assess damages against the defendant in the sum of $15,000.00.

/s/ LOUISE B. GRAVE,
Foreman.

[Endorsed]: Filed October 2, 1952.

United States District Court for the District of Idaho, Central Division

No. 1862

TILLIE MELY, as Administratrix of the Estate of A. E. Mely, Deceased,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

JUDGMENT

This cause came on for trial before the Court and a jury on September 29, 1952, et seq., both the parties appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for plaintiff in the sum of $15,000.00,

It Is Hereby Ordered, Adjudged and Decreed, That plaintiff recover of defendant the sum of $15,000.00, with interest, and costs taxed in the sum of .....

Witness the Honorable Chase A. Clark, judge of said court, and the seal thereof, this 3rd day of October, 1952.

[Seal] ED. M. BRYAN,
Clerk;

By /s/ LONA MANSER,
Deputy.

[Endorsed]: Filed October 3, 1952.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND JUDGMENT ENTERED THEREON OR IN THE ALTERNATIVE FOR A NEW TRIAL

Comes now the defendant above named and moves the Court for an order setting aside the verdict of the jury returned in said cause on the 2nd day of October, 1952, and the judgment entered thereon on the 3rd day of October, 1952.

This motion is made in accordance with the motion for directed verdict made by the defendant at the close of plaintiff's evidence, which motion was renewed by defendant at the close of all the evidence.

In the event the foregoing motion is denied, and

not otherwise, then the defendant moves the Court for a new trial upon the following grounds, to wit:

I.

The verdict and judgment are contrary to law.

II.

The verdict and judgment are contrary to the evidence and against the weight of the evidence.

III.

There was no substantial evidence that the defendant was guilty of negligence, which negligence in whole or in part contributed to the death of plaintiff's husband.

IV.

The evidence conclusively shows that the sole proximate cause of decedent's death was his own negligence.

V.

The Court erred in denying defendant's motion to direct a verdict in its favor at the close of the plaintiff's case.

VI.

The Court erred in denying defendant's motion to direct a verdict in its favor at the close of all the evidence.

VII.

There is no sufficient or substantial evidence tending to support the amount of the jury's verdict.

VIII.

The verdict is excessive and appears to have been given under the influence of passion and prejudice.

IX.

The Court erred in failing to give the following instruction requested by defendant, or an instruction substantially similar thereto:

"The defendant has introduced in evidence what is designated as Rule 93 of the Consolidated Code of Operating Rules and General Instructions:

" 'Within yard limits, second and inferior class, extra trains and engines must move at restricted speed.'

"The defendant has also introduced in evidence the following definition set forth in the Consolidated Code of Operating Rules and General Instructions:

" 'Restricted Speed—Proceed prepared to stop short of train, obstruction, or anything that may require the speed of the train to be reduced.'

"I instruct you that said rule was in force and effect at the time Engineer Mely was operating Engine No. 6015 and that said rule was promulgated for the safety of Engineer Mely, his fellow employees, and the public.

"I further instruct you that in the operation of Engine No. 6015, it was the duty of plaintiff's decedent, A. E. Mely, the engineer, to abide by this rule and to operate his engine in accordance therewith.

"I further instruct you that if you find from the evidence that Engineer Mely violated this rule, then he was guilty of negligence.

"If you find from the evidence that such negligence was the sole and proximate cause of his death, then your verdict should be for the defendant."

Exception to the Court's failure to give the above instruction was duly and timely taken and noted.

X.

The Court erred in admitting over the objection of defendant the testimony of plaintiff's witness, Merle C. Myhre, called by plaintiff for the sole purpose of testifying as an expert as to the meaning, interpretation and application of the rules of the defendant, Northern Pacific Railway Company, admitted in evidence and designated as "Consolidated Code of Operating Rules and General Instructions." Said rules were plain and unambiguous and there was no necessity for plaintiff to have called an expert witness to testify as to their meaning and application.

XI.

The Court erred in admitting over defendant's objection Rules 99, 101 and 108 of the Consolidated Code of Operating Rules and General Instructions above referred to.

XII.

The verdict of the jury was based upon a supposed fact not established by the evidence, which supposed fact was the sole and only ground upon which the opening and closing arguments of plaintiff's counsel were addressed to the jury.

The above motions, and each of them, are based upon the files and records herein and upon the

affidavits hereto attached, which affidavits are made a part hereof as though fully set forth herein.

CANNON, McKEVITT & FRASER,

By /s/ F. J. McKEVITT.

CLEMENTS & CLEMENTS,

By /s/ VERNER R. CLEMENTS,
Attorneys for Defendant

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Lewis—ss.

Ernest M. Lauby being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the above-entitled Federal Court beginning September 29, 1952, and ending October 2, 1952.

In the course of the deliberations of the jury, the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left

ahead of Extra 6015. This was the reason why the jury requested further instructions in this regard. During the deliberations of the jury, Juror Merle F. Denevan of Bovill, Idaho, represented that he had had previous experience as a railroad employee and from that experience he knew that in a case like the one then being considered by the jury, that the dispatcher at Lewiston, Idaho, under the rules of railroading, should have notified the members of train crew Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later in the same morning by Extra 6015 and that the dispatcher was required to advise the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. After the jury had requested further instructions in regard to the dispatcher being required to notify the two train crews under the rules and not having been further instructed, they returned to their jury room for further deliberations and after Juror Merle F. Denevan had related his experience as a railroader as herein above set forth, the jury reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both train crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Nez Perce, Ida., this 9th day of October, 1952.

/s/ ERNEST M. LAUBY.

Subscribed and sworn to before me this 9th day of October, 1952.

[Seal] /s/ H. F. BRAUN,
Notary Public in and for the State of Idaho, Residing at Lewiston, therein.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Idaho—ss.

John M. Flerehinger being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the above-entitled Federal Court, beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury, the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instructions in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern

Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Kooskia, Idaho, this 9th day of October, 1952.

/s/ JOHN M. FLEREHINGER.

Subscribed and sworn to before me this 9th day of October, 1952.

[Seal] /s/ H. F. BRAUN,
Notary Public in and for the State of Idaho, residing at Lewiston, therein.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Jonathan Gering, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning

of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Moscow, Rt. 1, Idaho, this 8th day of October, 1952.

/s/ JONATHAN GERING.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, Residing at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Paul H. Dinsen, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Genesee, Idaho, this 8th day of October, 1952.

/s/ PAUL H. DINSEN.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, residing at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Mrs. William Huffman whose true name is Alice Huffman, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Moscow, Idaho, this 8th day of October, 1952.

/s/ ALICE HUFFMAN,

/s/ MRS. WILLIAM HUFFMAN.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, Residing at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Mrs. E. C. Fish whose true name is Clara Fish, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015

that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Moscow, Idaho, this 8th day of October, 1952.

/s/ CLARA FISH,

/s/ MRS. E. C.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, Residing at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Mrs. C. L. Dix whose true name is Juanita Dix, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Moscow, Idaho, this 8th day of October, 1952.

/s/ JUANITA DIX,

/s/ MRS. C. L.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, Residing at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Mrs. Erwin Grave, whose true name is Louise Baker Grave, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Moscow, Idaho, this 8th day of October, 1952.

/s/ LOUISE BAKER GRAVE,

/s/ MRS. ERWIN.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, Residing at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Mrs. Kenneth M. Hunter (whose true name is Maud H. Hunter), being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have

advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Moscow, Idaho, this 8th day of October, 1952.

/s/ MAUD H. HUNTER,

/s/ MRS. KENNETH M.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, Residing at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Idaho—ss.

Alfred F. Killmar, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the above-entitled Federal Court beginning September 29, 1952, and ending October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instructions in this regard. During the deliberations of the Jury, Juror Merle F. Denevan of Bovill, Idaho, represented that he had had previous experience as a railroad employee and from that experience he knew that in a case like the one then being considered by the Jury, that the dispatcher at Lewiston, Idaho, under the rules of railroading, should have notified the members of train crew Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later in the same morning by Extra 6015 and that the dispatcher was required to advise the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. After the jury had requested further instructions in regard to the dispatcher being required to notify the two train crews under the rules and not having been further instructed, they returned to their jury room for further deliberations and after Juror Merle F. Denefan had related his experience as a railroader as herein above set forth, the jury reached the con-

clusion that there was a rule of the Northern Pacific Railway Company to give the members of both train crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Kamiah, Idaho, this 9th day of October, 1952.

/s/ ALFRED F. KILLMAR.

Subscribed and sworn to before me this 9th day of October, 1952.

[Seal] /s/ H. F. BRAUN,
Notary Public in and for the State of Idaho, Residing at Lewiston, therein.

[Endorsed]: Filed October 11, 1952.

[Title of District Court and Cause.]

ORDER

This matter came before the court on Defendant's Motion for Judgment N.O.V. and for a New Trial. Oral argument and briefs submitted by respective counsel have been duly considered by the court.

It appears that there is only one point in question here and that is whether it was proper for the court to permit expert witnesses to testify as to the meaning and interpretation of the operating rules of the railroad. However, it is not necessary

for the court to pass on this question because the propriety of the testimony was waived by counsel for both parties, when they refused the court's offer to instruct the jury to disregard this portion of the testimony.

It further appears that none of the other points urged in support of the motions have sufficient merit to justify a judgment n.o.v. or a new trial.

Now, Therefore, It Is Hereby Ordered that the Motion for Judgment N.O.V. be and the same hereby is denied and it is further ordered that the Motion for New Trial be and the same hereby is denied.

Dated this 3rd day of June, 1953.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed June 3, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Northern Pacific Railway Company, a corporation, hereby appeals to the United States Court for the Ninth Circuit from the final judgment entered in the above entitled action on October 3, 1952.

Notice Is Also Given that the Northern Pacific Railway Company, a corporation, appeals from that certain order entered in the above entitled action on June 3, 1953, denying the motion of de-

fendant, Northern Pacific Railway Company, a corporation, to set aside the verdict returned in said action and the judgment entered thereon or in the alternative for a new trial, and from each and every part of said order.

/s/ F. J. McKEVITT,

/s/ V. R. CLEMENTS,
Attorneys for Defendant.

[Endorsed]: Filed June 26, 1953.

In the United States District Court for the District of Idaho, Central Division

No. 1862

TILLIE MELY, as Administratrix of the Estate of A. E. Mely, Deceased,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

TRANSCRIPT

This cause was heard before the Honorable Chase A. Clark, United States District Judge for the District of Idaho, sitting with a Jury, at Moscow, Idaho, September 29, 1952.

Appearances:

PAUL HYATT, ESQ.,
ALFRED GEORGE SHONE, ESQ.,
Attorneys for the Plaintiff.

F. J. McKEVITT, ESQ.,
VERNER R. CLEMENTS, ESQ.,
Attorneys for the Defendant.

September 29, 1953, 10 A.M.

(Selection of jury.)

(Opening statement by Mr. Shone.)

Mr. Shone: May we dictate a stipulation into the record?

The Court: Yes, you may.

Mr. Shone: The Plaintiff offers in evidence 12 photographs, marked Plaintiff's exhibits 1 to 12.

Mr. McKevitt: One to twelve inclusive?

Mr. Shone: One to twelve inclusive—and the attorneys for the Defendant have agreed and stipulated that these may be introduced in evidence subject to our explanation.

The Court: The may be admitted.

Mr. Shone: Do you want me to do this with your exhibits?

Mr. McKevitt: We prefer to put on our own evidence.

Mr. Shone: They Were Being Marked by the Clerk so that they could be marked in order.

Mr. McKevitt: But I would prefer to put in our evidence when the time comes.

Mr. Shone: I was taking the advice of the Clerk.

Mr. McKevitt: Did the Clerk advise you to put in our evidence?

Mr. Shone: No—no—just for the numbers of the exhibits. [3*]

Mr. Shone: It is stipulated between Counsel for both parties that on November 11, 1951, according to the American Experience Mortality Table A. E. Mely had an expectancy of life, of 17.4 years and that Tillie Mely, his wife, on November 11, 1951, had an expectancy of life of 20.2 years.

It is stipulated by counsel for both sides that on November 11, 1951, and at the time of the collision in question, it was 258 feet from the switch east to the rear of the west car on the south siding. It is also stipulated that it is 604 feet from the switch east to the rear of the caboose on the main line, that was standing there on November 11, 1951; that it is 346 feet from the rear of the caboose west to the rear of the west car on the south siding. It is stipulated that a logging car is 47½ feet in length——

Mr. McKevitt: No, we wont stipulate to that. We will not stipulate that they are that long, our testimony will show that they are 40 feet long. I will stipulate that they are 40 feet long.

Mr. Shone: I took it from the man that made the map for you.

Mr. McKevitt: That would make quite a [4] difference in eighty cars.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Shone: That is satisfactory to us. We will stipulate they are 40 feet long. That a boxcar is 40 feet in length, is that true?

Mr. McKevitt: We have various lengths of boxcars.

Mr. Shone: What is the average?

Mr. McKevitt: We have 36, 40, 42½ 45, 47½.

Mr. Shone: That a boxcar averages 47½ feet in length——

Mr. Clements: They don't average 47½.

Mr. McKevitt: It would depend on what you have in the train, they may all be 40's.

Mr. Shone: Have you any measurements on the boxcars?

The Court: Can you stipulate on the length of the boxcars?

Mr. Clements: Not on the boxcars, your Honor.

The Court: If you can't stipulate go ahead.

Mr. McKevitt: We want to be reasonable, we will stipulate on 45.

Mr. Shone: All right, 45 on boxcars and 40 on logging cars.

Now, we have agreed with you as to certain evidence and you want to reserve that until later on. [5]

Mr. McKevitt: Do you have anything else?

Mr. Shone: No, I think that is all we have on that. Do you care to make a statement now.

Mr. McKevitt: Mr. Shone, you go ahead with your case, we will put our evidence in when you finish.

Mr. Shone: May I explain our exhibits, our photographs to the jury at this time?

Mr. McKevitt: I think that is proper for argument your Honor, not to have counsel tell the jury——

The Court: I understood that the pictures were admitted in evidence and that you would put on a witness to explain them.

Mr. Shone: If I put on associate counsel to explain these pictures would we have a right to make his argument to the jury, to explain how they were taken?

The Court: I can't permit that—haven't you a witness that knows about these pictures?

Mr. Shone: No, we were both there on one set, and the other, he was there.

The Court: They are admitted in evidence you can explain them in your argument to the jury, and they may be handed to the jury now. We can proceed while the jury is looking at the pictures.

DAVID A. LIVINGSTONE

called as a witness by the Plaintiff, after being first duly sworn testifies as follows: [6]

Direct Examination

By Mr. Shone:

Q. Mr. Livingstone, where do you live?
A. Lewiston.
Q. How long have you lived in Lewiston?
A. About thirty years.
Q. That's Lewiston, Idaho? A. Yes, sir.
Q. What is your occupation?

(Testimony of David A. Livingstone.)

A. I am a brakeman on the Northern Pacific.

Q. How long have you been a brakeman?

A. Since February, 1936.

Q. You were a brakeman on November 11, 1951?

A. Yes, sir.

Q. On what train?

A. On the extra East, Stites local.

Q. Do you remember the number?

A. I think it was 1618, I am not sure.

Q. Could it be 1648?

Mr. McKevitt: We will agree that it was.

The Court: That is agreed, go ahead.

Q. Where did that train start from on November 11, 1951? A. East Lewiston.

Q. Do you remember what time it left East Lewiston? A. No, I don't. [7]

Q. Do you know the approximate time?

A. Well, it was about 9:15 or 20.

Q. In the morning, a.m.? A. Yes.

Q. When you left East Lewiston what character of train did you have, or load, or cars?

A. We had only the caboose at East Lewiston, we picked up the train at Forbay.

Q. How far is Forbay from East Lewiston?

A. About two miles.

Q. And you left East Lewiston with what—a diesel? A. No.

Q. A regular steam locomotive? A. Yes.

Q. And a caboose? A. Yes.

Q. And at Forbay what did you do?

A. We stopped the caboose on the train, on the

(Testimony of David A. Livingstone.)

rear end and went around on the head end coupled on with the engine and made the air test.

Q. How many cars did you couple on?

A. I think it was 86.

Q. And you left there and went to what station?

A. We went back to East Lewiston first.

Q. And what did you do then? [8]

A. They had some cars we didn't have any bills for and Mr. Shehan the conductor wanted to go back to the yard office so we cut off the engine and went back to the East Lewiston yard office.

Q. Did you finally leave East Lewiston with the same number of cars that you left Forbay?

A. Left Forbay with the same number.

Q. I mean did you then leave East Lewiston with the same number after you went back?

A. We went back with the engine.

Q. Just with the engine? A. Yes.

Q. Then you came back to Forbay and picked up your cas? A. Yes.

Q. And then went to Arrow Station?

A. We stopped at North Lapwai.

Q. What did you do at North Lapwai?

A. We had some switching work to do at the sawmill there.

Q. And did you pick up any cars there or leave off any? A. We set some out.

Q. How many, do you remember?

A. It was two or three.

Q. Then you left with the remaining part of your train? A. Yes.

(Testimony of David A. Livingstone.)

Q. And went to where? A. To Arrow. [9]

Q. Do you remember what time you arrived at Arrow Station?

A. It was about, probably 10:40 or 10:45.

Q. That was in the morning? A. Yes.

Q. What did you do at Arrow Station?

A. We picked up some empties.

Q. Do you remember how many?

A. On the storage track—no I don't remember.

Q. Did you leave any at Arrow? A. No.

Q. You just picked up cars?

A. We picked up cars and headed in the Stites branch and stopped at the depot to register.

Q. What position did you have on that train?

A. I was rear brakeman.

Q. And who was the signalman?

A. Do you mean flagman?

Q. Do you have a signalman or flagman?

A. No, sir.

Q. Who acts as flagman or signalman?

A. The rear brakeman when he is there.

Q. Who was the other rear brakeman?

A. There wasn't any, just one.

Q. Was Mr. Sanman the engineer?

A. No, Mr. Dunlap.

Q. Mr. Dunlap was the engineer?

A. Yes. [10]

Q. Where does he live?

A. Lewiston—no, Clarkston.

Q. At Clarkston? A. Yes.

Q. Who was the fireman?

(Testimony of David A. Livingstone.)

A. Mr. Tippett.

Q. Where does he live?

A. Asotin, Washington.

Q. Who was the other brakeman?

A. Mr. Hull.

Q. What was he known as, the front or rear brakeman? A. The head brakeman.

Q. Who was the Conductor?

A. Mr. Feehan.

Q. Now, when you pulled into the station of Arrow do you remember about where the caboose was resting on the main track?

A. Yes, when we first stopped at Arrow to pick up—well, that track holds sixty cars, we stopped about 20 cars west of the west switch—the caboose was.

Q. Now, the west switch we speak of—I hand you plaintiff's exhibit 10 and ask you if the west switch you are talking about is shown in that picture? A. That's it.

Q. That is what is known as the west switch?

A. Yes. [11]

Q. And this picture is taken from what direction to what direction?

A. From the east looking west down the river.

Q. You are familiar with the railroad track there, are you not? A. Yes.

Q. And in looking west I will ask you how many curves are shown in the picture?

A. Two are shown, the second one faintly, the one way down here.

(Testimony of David A. Livingstone.)

Q. Is there a cliff to the north of that?

A. To the north of the second one?

Q. Yes.

A. Well, not very high, there is an embankment.

Q. But, there is an embankment?

A. Yes, this is the main bluff around this first one.

Q. Where from that west switch was the caboose when the collision occurred?

A. From the west switch?

Q. Yes.

A. It was about I think about fifteen cars east of the west switch—I would't say exactly—the engineer measured it.

Q. I hand you plaintiff's exhibit 7 and ask you if you are familiar with that photograph and where and from what direction it was taken?

A. From the west switch looking east up the river. [12]

Q. If we were to match exhibit 10 and 7 you would have about the railroad tracks?

A. Yes, you would.

Q. Particularly if you would put them in here close (indicating)? A. That's right.

Q. This in number ten is west and in number 7 it is east (indicating)? A. Yes.

Q. Now, in number 7 are shown two sets of tracks, will you explain to the jury what they are, which is the main line and which is the siding?

A. The one on the north, left of the picture is the main line and this is the siding (indicating).

(Testimony of David A. Livingstone.)

Q. On the main line do you see a train?

A. Yes.

Q. This (indicating) is the main line?

A. Yes.

Q. And in this picture the siding is to the south, it it? A. Yes.

Q. You are familiar with that? A. Yes.

Q. Now, tell the jury what kind of cars were in this string of cars that you had on the main line?

A. I don't remember exactly, we had several commercial or industrial cars on the head end, the hind part of the train, about 50 or 60 cars were log flats and we had [13] common flats.

Q. On the rear of the train forward were 50 or 60 logging cars? A. Yes.

Q. Tell us about how high a logging car is?

A. Oh, you mean above the rails?

Q. Yes—can you compare it with some other kind of car?

A. About 3½ feet, maybe, about that.

Q. Is it similar to what we call a flat car, in height? A. Yes.

Q. Does it have any distinguishing features as a logging car?

A. Yes, they have what they call bunkers—bunker flats for the logs, stakes and chains.

Q. Upright stakes?

A. On one side—they are up on one side.

Q. On one side of the car? A. Yes.

Q. Is that true on all cars, the stakes are on the same side on all cars? A. They are turned.

(Testimony of David A. Livingstone.)

Q. Sometimes on one side and simetimes on the other?

A. They are all turned one way or the other, but in one train they may be different so that they can unload from the hot or cold pond.

Q. How high are these stakes? [14]

A. They are about six feet above the deck of the cars.

Q. Now, do you remember the time of the accident? A. Yes.

Q. What time was it? A. It was 11:10.

Q. 11:10 a.m.?

A. It was that time when I looked at my watch and it happened maybe a minute or two before that —not over a couple of minutes.

Q. But it was approximately 11:10 a.m., when the collision occurred? A. Yes.

Q. Now, do you remember on that morning and previous to the time of the collision, some cars on the south siding? A. Yes.

Q. Tell the jury what kind of cars they were?

A. You mean the west end?

Q. Yes, on the west end, by that west switch?

A. There were several loads there; the local often sets cars out there when the N P Tracks were full.

Q. What kind of cars were they?

A. Mostly boxcars.

Q. Do you know how many?

A. I don't remember now.

Q. Do you know how far—we have stipulated

(Testimony of David A. Livingstone.)

on that—[15] would you say that it was approximately 250 feet from the west switch east to the rear of the west car on the siding?

Mr. McKevitt: We object to that as leading.

A. From the switch?

Q. To the end of the west car?

Mr. McKevitt: I have an objection that it is leading.

Mr. Shone: We stipulated on that.

The Court: That is true but the questions you are asking are somewhat leading. You can ask him how far it is without telling him.

Mr. Shone: We have stipulated on this.

Mr. McKevitt: Just a moment Mr. Shone, I am going to object to the use of the words we have stipulated this without specifying what the stipulation is. I don't want him to stipulate me out of court.

Mr. Shone: We will strike that question.

Q. About how many boxcars were there on the south side, west from the caboose on your train?

A. You mean where the caboose was struck?

Q. That's right.

A. There must have been six or eight cars approximately.

Q. On the south siding? A. Yes.

Q. They were west of the caboose?

A. Yes. [16]

Q. Do you know how far they were from the west switch, that would be the car farthest west?

A. Almost two car lengths in the clear.

(Testimony of David A. Livingstone.)

Q. Two car lengths from the switch?

A. No, from the clearance point, it would be a little over four cars from the switch.

Q. About four cars? A. Yes.

Q. Where were you immediately previous to the collision?

A. I was on the engine, I went to the depot—I just got off the engine and went into the depot to register.

Q. Where was the engine with reference to the station house? A. Right beside it.

Q. Right beside the station house?

A. Yes, exactly.

Q. Was there a station agent there that day?

A. Yes.

Q. Did you know him? A. Yes.

Q. Who was he? A. Mike Schroeder.

Q. Where, at the time of the collision, if you know, was W. R. Hull the other brakeman?

A. He was in the depot too.

Q. He was in the depot? A. Yes. [17]

Q. Other than Conductor Feehan was there any other member of the crew at the end of the train where the caboose was? A. No.

Q. Mr. Feehan was there in the caboose?

A. Yes.

Q. What was the engineer's first name?

A. Charles.

Q. Charles Dunlap? A. Yes.

Q. You have been over the road many times I assume? A. Yes.

(Testimony of David A. Livingstone.)

Q. In approaching the yard limit which is west of the west switch and running a train or riding on a train going east toward Arrow Station, and after you get into the yard limit can you see around the cliff that is shown in the one picture that was shown you?

Mr. Clements: Now, we object to that as incompetent, irrelevant and immaterial until it is shown where the man was. It would depend on his position, do you have him on the train or standing on the track, Mr. Shone?

Mr. Shone: He can walk up the track, or he can be in front of the train, on the front board.

Mr. Clements: Let him tell us where he was.

Q. Can you see around that curve? [18]

A. Not around it.

Q. Could you see the caboose and the train that you were on further to the west that the curve where the embankment is?

A. Further west than the curve?

Q. Yes.

A. Yes, there is on chance to see it, there is one place you can see it.

Mr. McKevitt: See what Mr. Witness?

A. See where our train was.

Q. As you approch, going east, as you come around the big curve with the embankment shown in the picture which I handed you, then when do you make another curve?

A. Around that big bluff in the picture.

Q. Yes.

(Testimony of David A. Livingstone.)

A. That's the last curve before the tangent where the passing track is.

Q. Is that known as a left curve to an engineer going east?

A. Going east it would be as you approach the west switch.

Q. As you proceed eastward is there what is known as a right hand curve?

A. Just before the switch yes, before you get to the switch.

Q. And then the track is straight?

A. Straight up almost to the east switch.

Q. While you were at the station did you have any knowledge that engine 6015 had left East Lewiston at 10:35? A. No, I did not. [19]

Q. Were you notified by anyone—strike that——

Mr. McKevitt: Counsel said, did this man have any knowledge that engine 6015 left East Lewiston at 10:35—there is no evidence here what time that left East Lewiston——

Mr. Shone: I will ask him.

Q. Do you know what time 6015 left East Lewiston? A. I don't exactly, no.

Q. Did you know that 6015 was a scheduled train?

Mr. McKevitt: We object to the form of that, it is suggestive that it was a scheduled train.

Q. Did you know that 6015 was a scheduled train that day?

Mr. McKevitt: We object to that if the Court, because Mr. Shone, by the form of that question

(Testimony of David A. Livingstone.)

is indicating that it was a scheduled train that day and there isn't any evidence to that effect, and the classification of this train is very important in this lawsuit.

Mr. Shone: I will show what it was at the time of the collision—that was an extra then, but I want to show.

The Court: Possibilities are that you better show it at the time you examine the witness——

Q. Do trains run on schedule from Lewiston East? A. Some trains, yes. [20]

Q. Are they daily trains? A. Yes.

Q. And are they freight trains?

A. Freight and passenger.

Q. What are the freight trains known as—numbers?

A. The only freight train east, scheduled, is number 622.

Q. Number 662 is a timetable train is it not?

A. Yes.

Q. And by time-table train we mean that it is marked on a timetable? A. Yes.

The Court: We will take a fifteen minute recess at this time:

September 29, 1952, 2:45 P.M.

Q. Mr. Livingstone, were you or were you not notified that extra 6015 was proceeding easterly toward Arrow Station on November 11, 1951?

A. No, we were not notified.

Q. By we, who do you mean?

(Testimony of David A. Livingstone.)

A. The whole crew, none of the crew so far as I know.

Q. That was the crew of engine 1648?

A. Yes.

Q. I will ask you if there is a block signal on that line?

A. Not between Lewiston and Arrow.

Q. Will you tell the jury what a block system is?

A. It is a system of block between stations to indicate [21] whether a train is in there or not, automatically.

Mr. McKevitt: I am going to object to any testimony with reference to block signals, their presence or absence for the reason and on the following grounds that it is a matter primarily for either state regulatory bodies or the National regulatory body—Interstate Commerce Commission, and there is no pleading here that we violated any State or National law in that regard.

The Court: There is nothing before the court now—I will take care of that on the next question.

Q. What day of the week was it?

A. Sunday.

Q. Did anyone——

Mr. McKevitt: Pardon, Mr. Shone—in view of your Honor's ruling, I move to strike the testimony of the witness to the effect that there was no block signal there as not being competent, relevant or material in this case, nor within the issues.

The Court: I will take the motion under advisement.

(Testimony of David A. Livingstone.)

Q. Did any member of the crew of engine 1648, on November 11, 1951, and at any time preceding the collision in question, place upon the rails west of the caboose one or more torpedoes?

Mr. McKevitt: That is objected to if your Honor please, on the ground that it is incompetent, irrelevant and immaterial. It only could go to the question that there had been a rule violation by the Company, and there is nothing in this complaint that the Northern Pacific violated any operating rule of the Company. That should have been pleaded.

Mr. Shone: We claim that it is pleaded in that it failed to give adequate warning and adequate signals.

The Court: He may answer.

A. As far as I know there were no torpedoes, of course, I was on the head end.

Q. If torpodoes had been place on the railroad tracks west of the caboose of your train could you hear them at the place where you were standing near the engine if they exploded?

Mr. McKevitt: The same objection to this line of testimony. It involves a rule violation of the company and no rule violation has been pleaded. I understand when you rely upon a rule violation then you must plead the violation and the rule so that we will know in advance what rule violation you rely upon. There are 12 separate subdivisions, if the Court please, charging us with 12 separate acts of negligence but in none of the 12 is there a charge

(Testimony of David A. Livingstone.)
that the defendant violated an operating rule by the result of which Mr. Mely met his death. [23]

Mr. Shone: We think it is covered, if your Honor please, by the allegation of negligence in furnishing Mr. Mely with a safe place to work and the failure to gave him warning of any kind and also by the 11th subdivision; failure to place men, flares or signals to give warning of said obstruction on said tract, a reasonable distance from said obstruction.

Mr. McKevitt: That goes to the question of a rule violation and no rule has been pleaded. There are 997 operating rules which go to the operation of train in that division.

Mr. Shone: I hadn't finished—also subdivision 12 failure to protect train 1648 while it was in such obscure position as aforesaid and in failing to properly protect train 6015 from colliding therewith——

The Court: ——I am wondering if this testimony shouldn't follow the introduction of the rule.

Mr. Shone: I am asking if the torpodoes were placed on there and I will place a witness on the stand and introduce the rule.

The Court: I will let him answer but it seems to me that we are getting the cart before the horse.

A. The question is whether I could have heard the torpedo?

Q. Yes. [24]

A. Well, I wouldn't say because if they had been down they would have been over a mile away from the depot and I might not have heard them around all those curves.

Mr. Shone: I think that's all.

(Testimony of David A. Livingstone.)

Cross-Examination

By Mr. McKevitt:

Q. Mr. Livingstone, you were subpoenaed by the plaintiff to appear here as a witness?

A. Yes, sir.

Q. And you also received instructions from your Railroad superiors to appear here?

A. Yes, sir.

Q. Eddie Feehan was in charge of your train, was he not? A. Yes, sir.

Q. He was in the caboose at the time of the collision? A. Yes, sir.

Q. And Eddie Feehan was killed was he not?

A. Yes, sir.

Q. Now, this accident happened November 11th, Armistice Day to be exact? A. Yes, sir.

Q. And a short time after the accident on November 11th, to be exact, on the 14th you gave a statement to a representative of the Northern Pacific Claims Department as to what knowledge you had of this accident?

A. That is correct. [25]

Q. And the statement was voluntarily given, was it not? A. Yes.

Q. You were not injured in the accident were you? A. No.

Q. Now, it is a fact that you departed from Lewiston, according to your recollection on November 14—from East Lewiston about 8:30 in the morning?

(Testimony of David A. Livingstone.)

A. There is probably more accurate that I could say now.

Q. Being a railroad man, you know that there are train registers that show the exact time, is that right? A. That is right.

Q. And at Arrow you had a train of 85 cars, is that true?

A. I thought it was 86 but I am not sure now.

Q. We won't quarrel about one car more or less. I believe you said when you gave this information to the claim Department that you registered out at 11:15 a.m. That would refer to registering out of Arrow, is that correct? A. Yes.

Q. Explain to the Court and jury what you mean by registering out, what do you do?

A. There is a train register at the register stations where we put the engine number and all that information such as time of arrival and departure.

Q. In other words, is it not a fact that 1684 was in the process of pulling out of Arrow at the time the collision occurred?

A. Yes, that's right. [26]

Q. You had registered?

A. Of course when I registered I allowed a few minutes to get back on the train and get in the clear of the P & L Bridge.

Q. You, of course, understand what it meant by "yard limits" do you not? A. Yes, sir.

Q. Those yard limits are marked by Yard Limit boards, are they not? A. Yes.

(Testimony of David A. Livingstone.)

Q. What is meant by yard limits?

A. It marks the limit of each end of the yard, it is a system of tracks within defined limits provided for the making up of trains, that is what the rule says.

Q. You, of course, from time to time are examined on the rule book, aren't you?

A. That's right.

Q. Mr. Shone has asked you something about placing torpedoes whether it was done by members of your crew and you stated that it wasn't?

A. Not to my knowledge.

Q. Do you know the reason it wasn't done—wasn't it because you were within yard limits?

Mr. Shone: We object on the ground that it is immaterial and not proper cross-examination if leading to any violation of the rules. [27]

The Court: The objection will be overruled in view of my permitting him to answer your question.

Q. The caboose, at the time of that collision, was how far within yard limits—how far east of the west board?

A. It would be maybe 70 cars, approximately, you could tell on the map exactly.

Q. It would be at least the length of the train, 70 cars, wouldn't it, that the caboose was east of the yard limit board, in other words, it was that much inside the yard limits?

A. Yes, I think you could say at least seventy cars.

Q. And isn't it a fact that when you are within

(Testimony of David A. Livingstone.)

yard limits there is no rule requirement of going back and flagging back——

Mr. Shone: ——just a moment, we object to that as not proper cross-examination.

Mr. McKevitt: That is just the point he went into.

The Court: He may answer.

Q. That is fact isn't it Mr. Livingstone, that when you are within yard limits you don't have to place torpedoes against an extra train?

Mr. Shone: Objected to as not proper cross-examination.

The Court: He may answer. [28]

A. Not against second class or inferior trains.

Q. And 6015 to your knowledge was characterized as an extra train, wasn't it? A. Yes.

Q. And being an extra train it is a second class or inferior train, isn't that true? A. Yes.

Mr. Shone: If the Court please, we object to this line of examination as not proper cross-examination, and we move to strike the answers to this character of examination.

The Court: The motion will be denied.

Q. To put it another way Mr. Livingstone, instead of that train being 6015 extra train, if that had been 314 the passenger train, under the instructions of Eddie Feehan, you boys would have back-flagged, would you not?

Mr. Shone: That is objected to us not proper cross-examination.

The Court: He may answer.

(Testimony of David A. Livingstone.)

Q. You would have gone back and flagged and put torpedoes out?

A. If we had been on their time, yes.

Q. Now, of course, Eddie Feehan was in charge of 1648? A. Yes.

Q. A very competent conductor was he not? [29]

A. Very good.

Q. If there had been any protection required against 6015 he would have been the man to instruct you to take care of it wouldn't he? A. Yes.

Mr. Shone: Objected to as incompetent, irrelevant and immaterial and a conclusion of the witness and not proper cross-examination.

The Court: He may answer.

A. If any protection had been necessary Eddie would have provided it because he knew I was the head end. We had work to do up there.

Mr. Shone: We now move the Court to strike the answer of the witness on the ground that it is a conclusion as to what Mr. Feehan would have done.

Mr. McKevitt: This is cross-examination he is your witness not mine.

Mr. Shone: I am submitting it to the Court.

The Court: I think it is immaterial.

Q. Now, in addition to the testimony that you are giving here and in addition to the statement you gave to the representative of the Claims Department, in the latter part of November you also testified as a witness in a joint hearing between the operating officials of the Northern Pacific and the representatives of the—Interstate Commerce Com-

(Testimony of David A. Livingstone.)

mission of the United States Government, didn't you? [30] A. Yes.

Q. Investigating this accident?

A. Yes, I did.

Q. And in that hearing before the I C C you testified substantially the same as you have here under cross-examination did you not?

Mr. Shone: We object to that as not proper cross-examination, calling for a conclusion and not the best evidence.

The Court: The objection will be sustained unless you want to show him his testimony.

Q. Do you recall at the hearing of the I C C and the operating officials—do you recall the date of that—was it November 23rd, or about that date.

Mr. Shone: We object on the ground that it is immaterial?

The Court: Sustained.

Mr. McKevitt: Very well.

Q. Now, Mr. Shone asked about the position of some box cars on the south track, that is the side track? A. Yes.

Q. The passing track, is that what you call it?

A. Yes.

Q. You stated that there were six or eight box cars west of the caboose, is that your testimony?

A. Between the caboose and where the caboose was struck and [31] the west end of the west box car was about six or eight cars.

Q. You used the term clearance point, do you remember using that? A. Yes.

(Testimony of David A. Livingstone.)

Q. Will you explain that to the Court and jury?

A. The point between the siding and the main line which is considered safe clearance between the two tracks.

Q. In other words the end of the cars—that string on the side tracks was such that a train moving on the main line track would not have struck it—that's what you mean, isn't it, by proper clearance? A. That's right.

Q. You say that you have ben over that run between North Lapwai and Arrow several times, is that your regular run?

A. It was for several years.

Q. You know a great deal about that situation down there, don't you? A. Yes, I think I do.

Q. Now, having in mind the position of this caboose and working westward about how much vision would an engineer on 6015 have of that caboose when it first came into his view?

A. When he first saw the caboose?

Q. When he could first see it?

A. When he could first see the caboose—he could see [32] most of the train before he could see the caboose.

Q. He could see most of 1684 before he could see the caboose?

A. That's right, because of that long curve.

Q. Standing on the main line track, that is, your train? A. Yes.

Q. How far would it be then when he could first get a glimpse across the curve?

(Testimony of David A. Livingstone.)

A. You could see from the yard limit to the cross-over there, I don't know how far it is, you can see on the map there.

Mr. McKevitt: Has this may been marked yet?

Mr. Shone: It has not.

Mr. McKevitt: I will have it marked.

May I have the witness come to the map?

The Court: Yes, you may.

Q. I call your attention to defendant's exhibit 22 marked for identification and will you step over here so the Jury can see what we are talking about. Now, are you familiar with the area depicted on that Map, Mr. Livingstone? A. Yes.

Q. Where is the main line?

A. Here (indicating)—this is the main line.

Q. That Heavy white mark? A. Yes.

Q. Where is Lewiston, on the map?

A. Down here ten miles.

Q. Where is Arrow? [33]

A. Here is the switch.

Q. It is shown on the map? A. Yes.

Q. At this point where you say he could have seen part of 1684 standing on the main line even before he could have seen the caboose is about where?

A. About at the yard limit and here is the yard limit sign, here.

Q. You are pointing now to a portion of the map the yard limit sign just below the figures 43.19 feet to point of collision, is that correct? A. Yes.

Q. That is where you say he could first see it?

(Testimony of David A. Livingstone.)

A. Yes, but I don't know whether it is correct—the map——

Q. We will show that the map is drawn to scale. Now, you point to the point on the map where he could see?

A. I would say that he could not see the caboose—here is the siding—the cars are in here and the caboose was obscured. He could see the train from here. The train was from here clear back up here and that's the part he could see—these log flats but not the caboose.

Q. Because of the cars on the siding?

A. He might have thought the cars were on the siding.

Q. He could have seen that long string of cars—it isn't [34] what he might have thought, but what he could have seen. A. Yes, sir.

Q. Where was 1684 headed for? A. Stites.

Q. Stites, Idaho. A. Yes.

Q. And it had to occupy the main line in order to reach its destination? A. Oh, yes.

Mr. McKevitt: That is all.

Redirect Examination

By Mr. Shone:

Q. Referring to plaintiff's exhibit 6 will you tell us where that picture was taken from and in what direction?

A. It was taken west of the west switch maybe twenty car lengths.

(Testimony of David A. Livingstone.)

Q. Was it taken at the curve with the embankment, looking east? A. At that high bluff.

Q. Looking east from the high bluff?

A. Yes.

Q. Can you see the station of Arrow in that picture?

Mr. McKevitt: The picture itself is the best evidence.

A. I can see where the junction is but I can't see the switch from there, no. [35]

Q. Can you see the railroad track?

A. See the Clearwater but not the P & L Branch.

Q. You can see the tracks?

A. The Clearwater branch, I can't see the tracks exactly?

Q. Is there a great deal of underbrush and trees in that vicinity?

A. Just what is in the picture.

Q. Is it from this position that you were testifying that you could see part of the train?

A. No, sir.

Q. It wasn't from here? A. No.

Q. Was it farther east? A. Farther west.

Q. He could see still further west?

A. He could see part of the train but not the caboose.

Q. But further west than where the cameraman was standing for this picture, exhibit 6?

A. Yes.

Q. He could see this train?

A. He could see all the middle of the train.

(Testimony of David A. Livingstone.)

Q. Did you go back there on that day?

A. Yes.

Q. With whom? [36]

A. I don't know the man's name.

Q. Was he an official of the Railroad Company?

A. No, he wasn't.

Mr. Shone: That is all.

Mr. McKevitt: No further questions, your Honor.

FRANK A. REISENBIGLER

called as a witness by the Plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Shone:

Q. Where do you live Mr. Reisenbigler?

A. Greenacres, Washington.

Q. Is that near Spokane? A. Yes, sir.

Q. Is it a suburb of Spokane? A. Yes, sir.

Q. What is your occupation?

A. Fireman for the Northern Pacific Railroad.

Q. How long have you been a fireman for the N. P. A. Since April 14, 1945.

Q. And have you followed that occupation continuously since?

A. Practically all of the time, yes, sir.

Q. On November 11, 1951, were you a fireman on a N. P. Engine? A. Yes.

Q. Out of Lewiston, Idaho? [37]

A. Yes, sir.

Q. What kind of an engine was that?

(Testimony of Frank A. Reisenbigler.)

A. Four unit diesel, 6000 horse I think it is supposed to be.

Q. What was the number of the first diesel unit, do you know?

A. The whole engine was 6015, the four units, the units are lettered A, B, and C and D.

Q. Were they in the reverse order, was D the lead unit? A. D, was the lead unit.

Q. Who was in D unit, the lead unit?

A. Mr. Mely, Mr. Brown and myself.

Q. What position did Mr. Mely hold with the Company at that time? A. Engineer.

Q. That was A. E. Mely? A. Yes, sir.

Q. And Mr. Brown?

A. He was a brakeman.

Q. What was his first name, do you know?

A. No, I don't remember.

Q. You were the fireman? A. Yes, sir.

Q. What time did you leave Lewiston that morning, if you did leave in the morning?

A. We were called for 10:20 as I recall.

Q. A.M.? A. Yes. [38]

Q. And before you were called for 10:20 a.m., what time were you called for?

A. That's the time we were called, to be on duty at 10:20.

Q. And if they hadn't called you for 10:20, when would you have gone to work?

Mr. McKevitt: That is immaterial, we object, it is entirely immaterial when he would have gone to work if he hadn't gone at 10:20.

(Testimony of Frank A. Reisenbigler.)

Q. That day?

The Court: I think it is immaterial, but I will let him answer.

A. Well, it was supposed to be 11:45 our schedule.

Q. What was your schedule to leave Lewiston on that day, November 11, 1951.

A. I don't get that.

Q. What was your regular schedule, your regular time.

A. We was running extra that day.

Q. Yes, I know, but what was your regular schedule if you weren't running extra?

Mr. McKevitt: We object, if the Court please, it is immaterial, he wasn't running on schedule, he said he was running extra.

Mr. Shone: That's right but I asked if he wasn't running extra what would his schedule have been. [39]

The Court: I think it is immaterial but I will let him answer, it probably will save time to let him answer.

A. If we were called for 11:45 we would have left Lewiston probably at 12 o'clock.

Q. That day you were called as an extra?

A. Yes, sir.

Q. Let me ask you Mr. Reisenbigler, were you not usually a regular train—a scheduled train?

Mr. McKevitt: We object to that as incompetent, irrelevant and immaterial.

(No ruling)

(Testimony of Frank A. Reisenbigler.)

A. No they don't always run schedule.

Q. No, but do you have a schedule.

A. Yes, sir, we have a schedule.

Q. And that schedule is to leave Lewiston at 12:30 isn't it?

Mr. McKevitt: What train.

Q. The time-table train 662?

Mr. McKevitt: We object to this—this your Honor, is a different train altogether.

The Court: I don't know where that train enters into this matter but he may answer.

Q. Is that correct? A. Yes, sir.

Q. On that day you were called earlier and what time did you leave Lewiston as an extra?

A. If I recall right, it was between 11 and 11:30.

Mr. McKevitt: You are talking about East Lewiston?

A. Yes, sir.

Q. When you left East Lewiston?

A. Yes, sir—no, it was about 10:35 as I recall.

Q. A.M. A. Yes.

Q. What kind of train did you have leaving East Lewiston.

A. We had no train, just a caboose.

Q. You had a diesel engine four units and just a caboose? A. That's right.

Q. And you went Eastward? A. Yes, sir.

Q. To what station? A. Forbay.

Q. What did you do at Forbay?

A. Nothing, we just passed through there.

Q. Then you came to Lapwai?

(Testimony of Frank A. Reisenbigler.)

A. Yes, sir.

Q. And what did you do at Lapwai?

A. Picked up 15 cars.

Mr. McKevitt: Do you mean North Lapway?

A. Yes, sir

Q. You say you picked up 15 cars there?

A. Yes.

Q. What kind of cars? [41]

A. Freight cars.

Q. Box cars were they?

A. Yes, box cars.

Q. Loaded?

A. I wouldn't say but I think they were loaded.

Q. Do you know what they were loaded with?

A. I couldn't say, no.

Q. After picking up these fifteen cars you left Lapwai for Arrow station did you? A. Yes.

Q. On your way to Arrow Station tell the jury how you and Mr. Brown and Mr. Mely were arranged in the front diesel unit.

A. Mr. Mely was sitting on the right in his proper position, Mr. Brown was on the left, and I was on the left hand side in the fireman's seat.

Q. Tell the jury what kind of vision the engineer, fireman and head brakeman will get while sitting in the front unit of the diesel?

A. Good vision, just as fas as you can see—a mighty good vision.

Q. What kind of glass have you there? Is there a glass?

(Testimony of Frank A. Reisenbigler.)

A. Yes—it is a very clear glass, you can see through it any time.

Q. How far does it extend across the unit in the front part? [42]

A. It is just like a windshield of a car, nothing to obstruct the view out the windshield.

Q. Is it bigger than an automobile windshield?

A. Yes, sir.

Q. Where is it situated—right in front of the unit? A. Yes, sir.

Q. Would all three of you look through this windshield at the same time? A. Yes, sir.

Q. And is it necessary to see ahead, that anyone put their head out to the side?

A. No, sir.

Q. You all keep within the unit?

A. Yes, sir.

Q. Do you have extended vision as the train proceeds eastward? A. Yes, sir.

Mr. Shone: May I show the witness some photographs?

The Court: Yes, you may.

Q. How long have you been running over that particular railroad track from East Lewiston to Arrow Junction in the State of Idaho?

A. Off and on at different times for the past seven years.

Q. And in the capacity of fireman?

A. Yes, sir. [43]

Q. Had you been firing for Engineer Mely for any length of time? A. No, sir.

(Testimony of Frank A. Reisenbigler.)

Q. How long?

A. Well, it's just that I caught him off the extra board, I would catch him off the extra board when his regular man is not with him.

Q. You had been with him at various times though? A. Yes, at various times.

Q. What kind of an engineer was he?

Mr. McKevitt: That is objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I considered him a good engineer.

Q. You considered him a careful engineer?

Mr. McKevitt: The same objection and it calls for a conclusion of the witness.

The Court: He may answer.

A. Yes, sir.

Q. I hand you Exhibit 1 and I will ask you to explain to the jury what you see in that picture in regard to the railroad track, and which direction you are looking? A. I am looking west.

Q. From what point? A. Toward Arrow.

Q. Do you know that big curve there? [44]

A. Yes, sir.

Q. With an embankment?

A. That's right.

Q. You are familiar with that embankment?

A. Yes, sir.

Q. That picture is taken west of the embankment—the photographer is standing west of the embankment? A. Yes.

Q. Facing east?

(Testimony of Frank A. Reisenbigler.)

Mr. McKevitt: I object to these questions they are all leading and suggestive your Honor.

The Court: Yes, your questions are leading, Mr. Shone.

Q. Now, as you approach that curve in an engine—a diesel engine, can you see the station of Arrow before rounding the curve?

A. No, sir, you can't, I don't think.

Q. When can you see the station of Arrow?

A. You would have to get about to the point of the curve, I think, if I recall it right—close to it.

Q. I hand you plaintiff's Exhibit 6 and I will ask you if you are familiar with the embankment there shown in the picture, to the left?

A. Yes, sir.

Q. Which way are you looking there?

A. You are looking east. [45]

Q. Can you see the station of Arrow in that picture?

A. No, you can't see the complete station.

Q. Handing you plaintiff's Exhibit 10 I will ask you if you know the topography of the country depicted in that photograph? A. Yes.

Q. And which way are you looking when you look at that photograph? A. West.

Q. Do you recognize the switch shown in the picture? A. Yes, sir.

Q. What is that known as?

A. That is the branch that turns off up the Clearwater River and the N.P.

Q. Is that known as the West or East switch?

(Testimony of Frank A. Reisenbigler.)

A. I don't recall as it is.

Q. Is that switch the farthest switch west from the station of Arrow? A. No.

Q. Is there one beyond the curve?

A. Yes, sir.

Q. Coming to the big curve and the embankment is that the last switch going west?

A. Yes—to the embankment.

Q. And that switch is for the purpose of what?

A. That is for the purpose of trains going up the Clearwater and going to Spokane.

Q. And is there a siding there?

A. There is above there.

Q. How far?

A. I couldn't say exactly but it is above the depot.

Q. Now, I hand you number 7 and ask you if you are familiar with the siding shown in Plaintiff's Exhibit 7? A. Yes, sir.

Q. Where is that siding with reference to the switch in the other picture you have?

A. That would have to be east of Arrow.

Q. East or West?

A. That would be east of Arrow?

Q. You come to that switch when you are traveling east before you come to Arrow?

A. I believe that is right, yes.

Q. You come to that switch when you are going east before you come to Arrow, traveling from Lewiston to Arrow?

(Testimony of Frank A. Reisenbigler.)

Mr. McKevitt: Do you understand that question?

A. I understand the question but I just can't place this siding.

Q. On November 11, 1951, as you were proceeding around the large curve with the embankment, and going east, could you see any cars ahead of you?

A. No, not ahead of us, there were cars in the siding we [47] could see.

Q. Where were those cars on the siding?

A. They would be on the right hand side of the main track.

Q. You are speaking of your right hand side traveling east? A. Yes.

Q. Would that be on the south side of the track going east? A. Yes, sir.

Q. Can you see the siding in those pictures?

A. Yes, sir.

Q. Is that the siding upon which these cars we are speaking of were standing? A. Yes, sir.

Q. And that switch, is that a switch leading into this particular siding upon which these cars were?

A. No, sir.

Q. You don't think so? A. No, sir.

Q. But you are sure that is the siding?

A. Yes, that is the siding.

Q. That is Exhibit 7? A. Yes, sir.

Q. In this Exhibit 7 which I am again handing you, do you see the main line? A. Yes, sir.

Q. That you were traveling on?

(Testimony of Frank A. Reisenbigler.)

A. Yes, sir. [48]

Q. What is on that main line?

A. Passenger train.

Q. As you approached the cars on the siding and you on the main line, what did you first observe?

A. The caboose—the back end of the caboose.

Q. Where did you observe it?

A. On the main line.

Q. Where did you see the caboose?

A. On the main line.

Q. Where was the diesel unit in which you were riding in regard to the caboose on the main line when you first observed it?

A. We were on the main line, too—the diesel unit was on the main line too.

Q. You were on the main line?

A. Yes, sir.

Q. And the caboose was on the main line?

A. Yes, sir.

Q. When you saw the caboose, how far were you from the caboose? A. I don't know.

Q. Where were you when you saw it?

Mr. McKevitt: We object to this, the witness has said that he doesn't know—now this is cross-examination of his own witness.

The Court: I think he may answer—just try to answer if you can. [49]

Q. Where were you when you first saw the caboose?

(Testimony of Frank A. Reisenbigler.)

A. We were on the engine and the engine on the main line.

Mr. McKevitt: Is he inquiring about the physical presence of this man?

The Court: That is the way I understand the question.

Q. And where was Mr. Brown?

A. In the center.

Q. And Mr. Mely? A. On the right.

Q. Where abouts on the railroad track was the diesel unit when you first noticed the caboose, in regard to curves or straight away track?

Mr. McKevitt: Object to that as the witness has testified that he doesn't know how far he was or how far the diesel was from the caboose when he first saw it.

(No ruling.)

A. I don't know.

The Court: The answer may stand.

Q. You don't know. A. No, sir.

Q. What occurred among the three of you in the diesel engine in the way of an announcement?

A. I and Mr. Brown both hollered at the same time. [50]

Q. What did you holler?

A. Stop the train, and Mr. Mely jumped up and "dynamited" the train.

Q. Did you both holler at the same time?

A. Yes, sir.

Q. Did anybody holler "big hole it"?

(Testimony of Frank A. Reisenbigler.)

A. No.

Mr. McKevitt: Your answer was "no."

A. I hollered "stop the train."

Q. What did Mr. Brown holler?

A. I can't say but I think he hollered the same thing.

Q. What did Mr. Mely do?

A. Jumped up out of his seat and dynamited the train.

Q. He had been sitting down? A. Yes.

Q. And he jumped up? A. Yes.

Q. And dynamited the train? A. Yes, sir.

Q. Explain how he did that?

A. He jumped up out of his seat and grabbed the brake valve and threw it over in emergency position.

Q. Where was the brake valve from where Mr. Mely was sitting?

A. Practically right there—right by the side of his hand.

Q. He first jumped up? A. Yes, sir. [51]

Q. And he placed his hand on the brake valve?

A. Yes, sir.

Mr. McKevitt: I dislike to be objecting all the time but these are all leading questions.

The Court: They are somewhat leading, however this has been answered.

Q. Then tell us what occurred after he dynamited it?

A. Mr. Brown jumped for the door and he jumped out, and Mr. Mely said to me "let's jump."

(Testimony of Frank A. Reisenbigler.)

Mr. Mely made for the door and I did too. I was going to jump out the left side and I saw my door was sticking or something and I looked around and Mr. Mely had already jumped and I grabbed my door with both hands and gave it a yank and it came open just as we hit the caboose.

Q. Did Mr. Mely jump out? A. Yes, sir.

Q. And Mr. Brown jumped out?

A. Yes, Mr. Brown jumped first.

Q. Did you see Mr. Mely that day afterwards?

A. No, sir.

Q. Did you see Mr. Brown? A. No, sir.

Q. Do you know where they were found afterwards? A. No, sir.

Q. At the time Mr. Brown and Mr. Mely jumped was the train still dynamited? [51-A]

A. Yes, sir.

Q. And by dynamiting a train you mean what?

A. The brakes are set on all the cars.

Q. Were the brakes also set on the four units of the diesel?

A. No, sir, they don't set on those, I don't believe—I am not sure.

Q. Does the diesel free-wheel when the train is dynamited?

A. I am not sure but I think it does.

Q. The four units? A. I am not sure.

Q. Do you know whether it did on this occasion or not? A. No, I don't.

Q. As you were approaching this standing ca-

(Testimony of Frank A. Reisenbigler.)

boose and before Mely dynamited that train, how fast would you say you were traveling?

A. I won't say. I haven't any idea. I was in no position to even see the speedometer.

Q. You have been riding trains as a fireman for how many years? A. About seven.

Q. Are you able to formulate an average judgment about the speed of a train from your position in the unit?

Mr. McKevitt: Counsel is cross-examining his own witness, he says that he cannot see, and counsel apparently doesn't like that answer and he is—— [52]

The Court: Are you an unwilling witness here, do you want to testify as to what you know?

A. I want to testify to what I know and that is all I can say.

The Court: Yes,—go ahead.

Q. Now,——

A. ——I have had a lot more experience on steam engines than I have on diesel engines.

Q. You mean in regard to your knowledge of the speed of an engine? A. Yes, sir.

Q. How long had you been working on diesels?

A. I have been on diesels at different times ever since the N P got them. It isn't very often that we are on these diesels, it is generally steam for the extra men.

Q. With your knowledge of the diesels and your experience are you able to formulate an opinion as

(Testimony of Frank A. Reisenbigler.)

to the speed of that train immediately before it was dynamited? A. No, sir.

Q. You couldn't form an opinion?

A. No, sir.

Q. Was there anything unusual in the speed of that train that drew your attention to the speed?

A. No, sir.

Mr. McKevitt: We object to the form of that question—— [53]

The Court: He has answered.

Mr. McKevitt: I move that the answer be stricken and the jury instructed to disregard it?

The Court: The motion is denied.

Q. When your crew left East Lewiston were you notified or any member of your crew notified that extra 1648 had left Lewiston for Arrow station?

Mr. McKevitt: We object to that on the ground that there was no legal obligation on the part of the railroad to so notify them.

The Court: He may answer.

A. We received no notice that I recall.

Q. Was there a dispatcher at East Lewiston, a Northern Pacific dispatcher? A. Yes.

Q. And if notice was given would that be imparted to the conductor, engineer and fireman?

A. Yes, sir.

Q. Did you have train orders that morning?

A. Yes, sir.

Q. Did you read your train orders?

A. Yes, sir.

(Testimony of Frank A. Reisenbigler.)

Q. Mr. Reisenbigler, do you know what your train orders were that morning?

A. I did at the time but I don't recall now.

Q. You did at the time? [54]

The Court: If those are the train orders that you have there you may show them to him to refresh his memory.

Q. I hand you book and ask you if this is your train order?

A. Yes, sir, if I recall right, that is it.

Mr. Shone: May I read this into the record and the the jury instead of putting it in evidence.

The Court: Yes, just read it into the record.

Mr. Shone: "Engine N P 6015, run extra, East Lewiston to Arrow; will not register at Spalding, number 661 has passed Spalding."

Q. What train was 661?

A. That was 661 coming west.

Q. According to your time schedule 661 is a west train and 662 is an east train?

A. That's right.

Q. That is time table train? A. Yes.

Q. At any time before the collision with train 1648, had you or your crew been notified that 1648 was at Arrow station or ahead of you?

A. No.

Q. You had not. A. No. [55]

Q. Now, as you came around the curve just west of this switch, you said that you saw some box cars on the south siding? A. Yes, sir.

Q. Could you, in coming around the curve, the

(Testimony of Frank A. Reisenbigler.)

first one, where the embankment is, could you see the cars or any of them,—any of the cars on 1648 on the main line? A. No, sir.

Q. Did anyone of your crew say anything in regard to their seeing that train at that time?

A. No, sir.

Q. Do you know where the train was, approximately, with regard to the west switch when you hollered "stop the train." A. No, sir.

Q. Do you know how far you were from the caboose standing on the track when you hollered to Mely to stop the train? A. No, sir.

Q. Can you give us an approximate distance?

A. No, sir.

Q. You cannot. A. No, sir.

Q. Now there are no block signals on that system between east Lewiston and Arrow station?

Mr. McKevitt: We make the same objection that we heretofore made to this question. [56]

The Court: There is no contention here that there is a system of block signals in there?

Mr. McKevitt: No.

The Court: Then can you stipulate that there were no block signals there?

Mr. McKevitt: We will stipulate that there were none and it was not required?

The Court: Just that there were none.

Mr. Shone: That there were no block signals between East Lewiston and Arrow station.

Mr. McKevitt: That is correct.

(Testimony of Frank A. Reisenbigler.)

Mr. Shone: Then I won't take up any more of the Court's time with that.

Q. On Sunday, as was November 11, 1951, what was the usual work done at Arrow stations, if any?

A. We was to pick up some cars there, the way I understood it?

Q. You were to pick up some cars?

A. Yes, sir.

Q. What about other trains running east from Lewiston on Sunday, was it a working day?

A. No, sir.

Q. Tell the Jury in your own words the condition that you would expect as a fireman, running east, at Arrow station, on Sunday?

Mr. McKevitt: We object to that form of question,—what he would expect—— [57]

Q. As usual and customary then?

The Court: It is not a question of what he expected, but what condition existed, however, I will let him answer.

A. The only thing we figured on meeting was the passenger train 311, and they wasn't due for quite a while.

Q. Which way were they traveling?

A. West.

Q. Toward you, that is, in an opposite direction? A. Yes, sir.

Q. Why didn't you expect to meet another train going ahead of you in the same direction?

Mr. McKevitt: We object to this as argumentative.

(Testimony of Frank A. Reisenbigler.)

The Court: He may answer.

A. Well, sir, if there had been any other trains coming, we would have probably got orders at Arrow.

Mr. McKevitt: You mean coming against you.

A. Yes, coming against us.

Q. And how about a train ahead of you?

A. Depending on where they were, maybe we would have gotten some orders on them, too.

Q. You say you probably would have gotten some orders.

A. Yes, if they were to let us around them or something like that.

Q. You mean at Arrow station?

A. Yes, sir. [58]

Q. Up to the time of the collision you had no orders or warning? A. No, sir.

Q. As you approached the caboose standing on the main line, do you know whether or not any torpedoes had been placed on the rails west of the caboose?

Mr. McKevitt: The same objection to this line of testimony if your Honor please.

The Court: He may answer.

A. No, sir, I don't.

Q. Were there any torpedoes placed there?

A. I didn't hear any?

Q. Tell the jury what a torpedo is and what kind of a noise it makes when it goes off?

A. Well, it is a flat piece of metal that clamps on the rail and when the engine goes over it, it

(Testimony of Frank A. Reisenbigler.)

explodes like dynamite, like a big loud firecracker.

Q. And it is secured to the rail?

A. Yes, it clamps on the rail.

Q. And what is the purpose of a torpedo or two torpedoes on the rail?

A. It works as a caution, there may be someone ahead of you.

Q. And what does the engineer do when he hears these torpedoes go off?

A. He generally slows his train to restricted speed.

Q. Is it a duty of his to do that when he hears torpedoes go off under his train? [59]

A. Yes, sir.

Q. Does he bring it to a stop?

A. Not necessarily.

Q. Is it an indication of danger ahead?

A. Yes, sir.

Q. And is it one of the indications of danger which railroad engineers heed? A. Yes, sir.

Q. Indications of danger ahead?

A. Yes, sir.

Q. And do you heed those? A. Yes, sir.

Q. Is there any other warning that they put out in case of an obstruction ahead?

Mr. McKevitt: Is it understood that I may have a general objection to this line of questioning, your Honor?

The Court: Yes, you may.

Q. Such as fusees? A. Yes.

Q. Tell the jury what a fusee is?

(Testimony of Frank A. Reisenbigler.)

A. It is made up of a kind of powder they use, and it throws a red light, and they set them on the track.

Q. And how long does one of them burn?

A. Approximately ten minutes or so.

Q. And how do you put them on the track?

A. They have a spike they stick in the tie. [60]

Q. You light one end and stick it in the tie?

A. Yes, sir.

Q. You can throw it in the tie?

A. Yes, sir.

Q. Then if you come upon a fusee, as a fireman, moving in the direction that the fusee is burning,—can you tell by looking at a fusee about how far a moving train would be ahead of you, in time,—in minutes? A. No, sir.

Q. Not in time? A. No, sir.

Q. Well, assuming that you were moving eastward that was burned down half way——

Mr. Clements: Now, if the Court please, we object to this, it is in the form of a hypothetical question——

The Court: ——Yes, it is assuming conditions that did not exist at this time and place.

Q. There were no fusees there this day, between your train and the caboose?

A. That is right.

Q. Now, at Arrow what was your crew going to do when you got into the station of Arrow?

A. We were to pick up some cars there as I understood it.

(Testimony of Frank A. Reisenbigler.)

Q. And where were those cars? [61]

A. They were in the siding, that would be west of the depot.

Q. West of the station? A. Yes.

Q. The cars that you were going to pick up would be west of the station of Arrow?

A. Yes, sir.

Q. Do you know how many you were going to pick up? A. No, sir.

Q. Where about would Engineer Mely have stopped his train if he was going to pick up these cars at Arrow station?

A. About at the depot?

Q. Had the track been cleared, of course?

A. Yes, about at the depot.

Q. Do you know how far the depot is from the west switch? A. No, sir.

Q. You don't know? A. No, sir.

Q. Did you know that the engine on the standing train, 1648, was at the depot when you saw the caboose just east of the switch? A. No, sir.

Q. You didn't know that? A. No, sir.

Q. At any time before you hollered "stop the train" or before Brakeman Brown hollered, had you seen this train or any part of this train 1648 on the main line track? [62] A. No, sir.

Q. Were you keeping a look-out?

A. Yes, sir.

Q. What was Mr. Mely doing?

A. We were all looking straight down the track.

(Testimony of Frank A. Reisenbigler.)

Q. All three of you? A. Yes, sir.

Q. And when you saw it you hollered?

A. Yes, sir.

Q. You hollered at the same time Mr. Brown hollered? A. Yes, sir.

Q. And Mr. Mely responded by dynamiting the train? A. Yes, sir.

Mr. Shone: I think that is all.

The Court: We will recess at this time until 10 o'clock tomorrow morning. Ladies and gentlemen of the Jury, I will ask you to remember the admonition I gave you at the first recess, I will not call this to your attention again during the trial.

September 30, 1953, 10 A.M.

Cross-Examination

By Mr. Clements:

Q. How long have you been employed by the Northern Pacific? A. Over seven years.

Q. And in what capacity?

A. Fireman. [63]

Q. And what is your place of residence?

A. Greenacres, Washington.

Q. And on November 10 and 11, 1951, where were you working out of? A. Spokane.

Q. That is where you picked up your equipment for the runs? A. Yes, sir.

Q. As I understand it you had ridden locomotive 6015 on November 10? A. Yes, sir.

Q. And you had brought that locomotive from

(Testimony of Frank A. Reisenbigler.)

Palouse, Washington? A. Yes, sir.

Q. By way of Arrow Junction?

A. Yes, sir.

Q. The day previous to the accident?

A. The accident was on November 11, Armistice Day? Yes, sir.

Q. Now, on your way to Lewiston, what time did you pass Arrow Junction on the 10th coming into Lewiston?

A. If I recall it would probably around one o'clock.

Q. What did you observe relative to any cars being on the siding?

A. I observed cars on the siding.

Q. In your direct examination you described 15 cars on the siding on the day of the accident, did you see those same 15 cars the night [64] before? A. Yes, sir.

Q. Now, when you come from Palouse to Lewiston, do you come on a considerable down grade?

A. Yes, sir.

Q. Let me ask, were these 15 cars in the same position as you had seen them? A. Yes, sir.

Q. Coming down the Kendrick grade did you make any test of your air equipment?

A. Tested the dynamic brakes and also make a speedometer check at that time.

Q. Now, there are four units in this diesel equipment, is there not? A. Yes, sir.

Q. And the equipment can be operated from either end? A. Yes, sir.

(Testimony of Frank A. Reisenbigler.)

Q. Who is the boss or who is in charge of operating the locomotive equipment? Is it the fireman or the engineer? A. The engineer.

Q. And is his word final over the fireman?

A. Yes, sir.

Q. And the brakeman? A. Yes, sir.

Q. State whether or not there is a speedometer on both the A unit and the D unit of 6015?

A. Yes, sir. [65]

Q. What does that speedometer look like?

A. Well, it is a round glass a whole lot like a speedometer on a car.

Q. And it indicated the miles per hour by a needle, does it? A. Yes, sir.

Q. When it is in operation? A. Yes, sir.

Q. Now, is that equipment the same in Unit A and D unit? A. Yes, sir, just the same.

Q. You say that you made a test of that speedometer on your way into Lewiston that night?

A. Yes, sir.

Q. When did you make that test?

A. Right after we left Troy.

Q. How did you make it?

A. I went back to D unit and took the speedometer reading and took hold of the radio and called Mr. Mely and told him how many miles an hour we were going,—if I recall right it was about 25 miles an hour and he answered me back O.K.

Q. And that was the day before?

A. Yes, sir.

Q. Now, when the train is in operation, the

(Testimony of Frank A. Reisenbigler.)

only operators of the equipment is the one or ones on the front end, is that right?

A. Yes, sir. [66]

Q. And you say that the two units are equipped for intercommunication by radio?

A. Yes, sir.

Q. About what time did you get into Lewiston that night? A. Around 2 or 2:30.

Q. And you laid over until the next morning?

A. Yes, sir.

Q. Did you stay with Mr. Mely that night?

A. Stayed at the same hotel.

Q. You recall, of course, the next morning?

A. Yes, sir.

Q. Were you called as a member of the engine crew, any earlier than the train crew?

A. About 15 minutes, if I recall.

Q. Why are you called fifteen minutes earlier?

A. That fifteen minutes is to inspect our equipment before we start on the trip.

Q. Did you make any inspection of this equipment while you were at East Lewiston?

A. Yes, sir.

Q. What inspection did you make?

A. One of the duties of the fireman is to check the motors to see if they are all running perfectly, and the engineer generally walks around his train, —around the engine, and inspects his brake shoes to see that they are in place and such as that. [67]

Q. Did you notice Mr. Mely making that kind of an inspection? A. Yes, sir.

(Testimony of Frank A. Reisenbigler.)

Q. Now, when you boarded the train or locomotive at East Lewiston, what did your train consist of at that time?

A. When we first got on it was just the locomotive.

Q. Did you later connect up any other equipment with it? A. We picked up the caboose.

Q. When you picked up the caboose who constituted your crew?

A. There were three brakemen, conductor, engineer and fireman.

Q. Who was the conductor?

A. Mr. Granger?

Q. Who were the brakemen?

A. Mr. Jewell, Mr. Ferris and Mr. Brown.

Q. Before you left the yard of East Lewiston did any other railroad employee make any inspection of the brakes of 6015 and the caboose that was then connected to it? A. Yes, sir.

Q. What kind of inspection was that?

A. Brake test.

Q. What do you mean by brake test?

A. By setting the automatic air on the engine, they have a pressure gauge in the caboose, to see how many pounds of pressure they receive in the caboose.

Q. After your full train is made up is that air pressure [68] indicated in the caboose?

A. Yes, sir.

Q. What did your equipment in the train consist of between East Lewiston and North Lapwai

(Testimony of Frank A. Reisenbigler.)

that morning? A. Engine and caboose.

Q. That is what you call, in railroad parlance, a caboose hop, isn't it? A. Yes, sir.

Q. That means that you connect the engine to a caboose for the purpose of going up to a later place or a further destination to make up the train, does it? A. Yes, sir.

Q. Did you hear any instructions or orders given Mr. Mely that morning as to any cars he should pick up on his trip? A. Yes, sir.

Q. What did you hear?

A. We was supposed to pick up cars at Lapwai and at Arrow.

Q. You mean North Lapwai?

A. Yes, sir.

Q. Now, about how far is North Lapwai, as you recall, from East Lewiston?—I think that is immaterial,—Now, what did you do when you got to North Lapwai,—did you pick up any cars?

A. Yes, sir.

Q. How many cars did you pick up? [69]

A. If I recall, it was fifteen.

Q. And the crew then working was the men that you have just named? A. Yes, sir.

Q. After you got your fifteen cars made up into your train were any tests made before you pulled out of East Lewiston of your braking equipment?

A. Yes, sir.

Q. What did that test consist of and who made it and how do you know it was made?

(Testimony of Frank A. Reisenbigler.)

A. By the exhaust from the brake valves and whistle for the air test.

Q. What do you mean,—who makes the whistle for the air test? A. The engineer.

Q. What does that indicate for the rest of the crew?

A. That he was going to set up the brakes.

Q. What do you mean "set up the brakes," what does that term mean?

A. To use your independent brake lever and to draw off so many pounds of air, 12 pounds maybe, and maybe more.

Q. Is that a usual procedure in starting a train?

A. Yes, sir.

Q. Any train? A. Yes, sir.

Q. And that test was made in North Lapwai before pulling [70] out with your fifteen cars?

A. Yes, sir.

Q. From North Lapwai you proceed generally in the direction of Spalding, Idaho, don't you?

A. Yes, sir.

Q. Then are you required to cross Clearwater River on a railroad bridge? A. Yes, sir.

Q. Was any other brake application or further brake test made after you left North Lapwai?

A. Just before we came to the bridge.

Q. Is the bridge situated on the curve of the track? A. Yes, sir.

Q. And you made a brake test there?

A. Yes, sir.

(Testimony of Frank A. Reisenbigler.)

Q. After you got over the bridge did you notice Mr. Mely increasing his speed?

A. I think he did some, it seemed to pick up some speed.

Q. Now, what is your best judgment and recollection as to the distance from the time you get across the Spalding bridge until you come to Arrow, Idaho? Is it approximately a mile?

A. In that neighborhood, probably a mile or better.

Q. As you proceed from the east end of the Spalding bridge toward Arrow Junction are there any other signs,—any block signs along the right-of-way for the engineer's [71] direction?

A. There is a mile post sign, you have a sign indicating one mile to the station and you have the yard limit boards.

Q. You say there is a warning sign on the right-of-way? A. Yes, sir.

Q. Was it there in place that morning?

A. Yes, sir.

Q. And that is one mile this side of the yard board sign? A. Yes, sir.

Q. By the yard board sign you mean that is advising the engineer and the crew that it is the beginning of the yard limit? A. Yes, sir.

Q. How far is the warning sign from the yard board sign? How far this side of the yard board sign is the warning sign?

A. I would say it is in the neighborhood,—oh, it is not very far, I wouldn't say exactly.

(Testimony of Frank A. Reisenbigler.)

Q. What is the purpose of that sign?

A. To warn the crew that they are entering the yard limits.

Q. As you passed the warning sign that morning did you notice Engineer Mely decreasing his speed any? A. I did not.

Q. As you passed the yard board sign did you notice the engineer decreasing his speed any? [72]

A. I did not.

Q. Did you notice the engineer decreasing his speed any at any place after you crossed the Spalding bridge? A. No, sir.

Q. As a railroad man, and under the rules what did the yard board sign indicate to you and what are you supposed to do?

A. Drive at restricted speed, prepare to stop short of all objects.

Q. Is that the definition of restricted speed?

A. Yes, sir.

Q. Is that the definition or the substance of the definition as contained in the rule book?

A. That would be the substance of it.

Q. What do you say restricted speed means?

A. To stop short of all objects,—to be able to.

Q. Then there are yard board signs as you are going into the yard limits? A. Yes, sir.

Q. And the engineer, at that point, was supposed to be traveling on restricted speed?

A. Yes, sir.

Q. Was he traveling or was he operating on restricted speed that morning, on the morning of the 11th of November after he passed that sign? [73]

(Testimony of Frank A. Reisenbigler.)

Mr. Shone: To which we object as calling for a conclusion of the witness and invading the province of the jury.

The Court: It might be interesting to hear his answer because he said that he didn't know anything about the speed, when you were examining him, as I recall. He may answer.

A. Well, the only way I can answer that is this: I don't see how he could have been traveling at restricted speed.

The Court: The answer may be stricken in view of the objection.

Q. What would have happened to that train had he been traveling at restricted speed?

A. I think he could have stopped.

Q. You say that you don't have any idea as to the rate of speed he was traveling as he passed the yard board sign? A. No, sir.

Q. Do you have any idea as to how far away the caboose was the first time you saw it?

A. No, sir, I don't.

Q. As I understand it, you did not experience any decrease in speed from the time he passed the yard board sign until the collision took place?

A. No, sir.

Q. What do you recall either you or Mr. Brown or Mr. Mely saying about cars ahead of you? [74]

A. There wasn't anything said about cars ahead of us.

Q. As I understood you in your direct examina-

(Testimony of Frank A. Reisenbigler.)

tion, you said that you and Mr. Brown yelled first, is that correct?

A. We did. We hollered when we saw the caboose?

Q. Did Mr. Mely say anything?

A. Not at the present—he jumped up and applied the air brake.

Q. What do you mean that "he jumped up"?

A. Got up out of his seat.

Q. Was it necessary for him to do that?

A. No, sir.

Q. Was the air brake throttles and levers within easy reach as he sat on his seat? A. Yes, sir.

Q. The engineer would be riding on the right hand side of the cab in this diesel, would he not?

A. Yes, sir.

Q. How far would he have to reach out for this lever for this braking application?

A. It is not very far, it is just real close,—just about in that position to put your hand on the brake lever (indicating).

Q. Then he could have just reached out with his left hand for the operation of that lever?

A. That's right. [75]

Q. Instead of that he jumped out of his seat on this particular occasion? A. Yes, sir.

Q. And then the crash and collision occurred shortly thereafter? A. Yes, sir.

Q. You heard someone telling Mr. Mely to pick up cars at North Lapwai and Arrow, do you know who told him that?

(Testimony of Frank A. Reisenbigler.)

A. I think it was Mr. Brown.

Q. The brakeman? A. Yes, sir.

Mr. Clements: I think that is all at this time.

Redirect Examination

By Mr. Shone:

Q. Mr. Reisenbigler, you are still an employee of the Northern Pacific Railroad Company?

A. Yes, sir.

Q. And you are steadily employed?

A. Yes, sir.

Q. In and around Spokane, Washington?

A. Yes, sir.

Q. Tell the Jury at what station you last inspected the air brakes of your train before going into the Arrow station?

A. That was at North Lapwai. [76]

Q. And how far is that from Arrow?

A. It isn't over two or three miles.

Q. And that's about two or three miles west of Arrow station? A. Yes, sir.

Q. And at North Lapwai was your train at a dead halt for that inspection? A. Yes, sir.

Q. And from North Lapwai is it uphill to Arrow? A. Not very much.

Q. Is it upgrade? A. I couldn't say.

Q. Well, do you run it against the stream of the river? A. Yes, you do.

Q. And a river runs down hill doesn't it?

A. That's right.

(Testimony of Frank A. Reisenbigler.)

Q. So there is some upgrade from North Lapwai to Arrow? A. Yes, sir.

Q. And you had to travel about three miles to get to Arrow? A. Yes, sir.

Q. It's real close? A. Yes, it is.

Q. Of course, Mr. Reisenbigler, you were injured in this collision? A. Yes, sir.

Q. You did have a fracture of the skull?

A. Yes. [77]

Q. Do you still suffer from your injuries?

A. Mq skull fracture doesn't bother me any.

Q. Now, yesterday you mentioned that the only knowledge you had of a train was a number 611 coming toward you? A. Yes, sir.

Q. Where was 611 when you were at North Lapwai?

A. I don't recall just now where it was that we was supposed to meet them, where we figured on it.

Q. Had it gone by toward Lewiston?

A. No, sir.

Mr. McKevitt: I think it is 311.

The Court: I don't think you should interrupt Counsel in his examination, let him take care of it.

Mr. McKevitt: I am sorry, your Honor.

Q. 311, is that correct? A. Yes, sir.

Q. But you would not meet that train between North Lapwai and Arrow? A. No, sir.

Q. You are sure of that? A. Yes, sir.

Q. And that was the only train that you knew was on the track ahead of you? A. Yes, sir.

Q. And you knew exactly where that was?

(Testimony of Frank A. Reisenbigler.)

A. I don't recall. [78]

Mr. McKevitt: If the Court please, I am going to object, these are all leading questions,—Counsel forgets this is his witness.

The Court: Yes, but I am inclined to think that he is a very unwilling witness so far as the Plaintiff is concerned and a very willing witness so far as the defendant is concerned. You may cross-examine him.

Mr. Shone: I was about to ask permission to cross-examine him.

The Court: You may do so.

Q. Do you know what time 311 left Spokane, Washington?

Mr. McKevitt: Your Honor, for the purpose of the record may I make an observation at this time?

The Court: Yes, you may.

Mr. McKevitt: I object to counsel being permitted to cross-examine this witness for the reason and upon the ground that he has not claimed surprise so far as any testimony the witness has given and this witness was subpoenaed by this man here.

The Court. I can't help but observe that this witness answered all of your questions very readily in regard to speed and things of that kind and when counsel for the plaintiff was examining him he didn't know anything about speed,—he didn't know [79] how fast the train was running or anything at all about it but he has no hesitancy in testifying, under your cross-examination, everything in connection with it. I want to caution the jury

(Testimony of Frank A. Reisenbigler.)

not to pay any attention to my remarks to counsel. I will also withdraw the ruling of the Court that you may cross-examine the witness, Mr. Shone.

Mr. Shone: All right.

Q. Mr. Reisenbigler, did you have any knowledge of the time that 311 left Spokane, Washington? A. No, sir.

Q. Is it listed in the timetable?

A. Yes, sir.

Q. And were you familiar with that timetable on November 11, 1951?

A. Yes, I was at that time.

Q. If I showed you a timetable would you know what time it left Spokane?

A. Yes, sir, I would.

The Court: Just for the purpose of saving time, —I don't suppose that counsel will object to giving any information from that timetable.

Mr. Clements: Providing it is the right kind of timetable, there are several timetables in effect down there so far as the defendant's operation is concerned. [80]

The Court: I don't suppose I saved any time.

Mr. McKevitt: I understood that he wanted to show what time 311 left Spokane, Washington.

Mr. Shone: Will you agree on it?

The Court: We have taken up much more time now than if I had kept still,—I thought I could shorten this a little. Go ahead.

Q. What time did it leave Spokane? Mr. McKevitt will not agree.

(Testimony of Frank A. Reisenbigler.)

Mr. McKevitt: Sure we will agree, but I don't know what the materiality of this is.

The Court: You go ahead with your examination Mr. Shone, I apologize to you for interrupting.

Q. Handing you Plaintiff's Exhibit 23 I will ask you if that is a timetable dealing with passenger trains as well as freight trains?

A. Yes, sir.

Q. Will you look and see what time 311 left Spokane on November 11, 1951?

The Court: Is it there on the timetable?

A. Yes, sir, it was 9:10.

Q. In the morning? A. Yes.

Q. What time would it arrive at Arrow station? [81] A. 1:20.

Q. P.M. A. Yes, sir.

Q. After Engineer Mely put his train into emergency, was there anything else he could do to bring it to a stop? A. No, sir.

Mr. Shone: That's all.

Mr. Clements: That's all.

A. G. FERRIS

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Shone:

Q. Where do you live, Mr. Ferris?

A. Spokane, Washington.

Q. And are you an employee of the Northern

(Testimony of A. G. Ferris.)

Pacific Railway Company? A. I am.

Q. Presently employed by that company?

A. I am.

Q. And what is your occupation?

A. I am a conductor, but at the time I am employed as a brakeman.

Q. You have been a conductor for how long for that company?

A. I judge about two and a half years since I was promoted. [82]

Q. And brakeman? A. Since 1943.

Q. And how long have you been with the company? A. Since 1943.

Q. Were you ever on the run between Lewiston, Idaho, and Spokane, Washington?

A. Yes, sir, I was.

Q. What is that run called between Lewiston and Spokane? A. 661 and 662.

Q. 661 is coming down?

A. That is going west.

Q. Coming from Spokane to Lewiston?

A. Yes, that's right.

Q. And the train from Lewiston to Spokane is 662. A. That's right.

Q. Now, on November 11, 1951, you were operating a diesel four-unit, were you?

A. I was braking on the highball that day.

Q. What they call the highball?

A. Yes, sir.

Q. That is a scheduled train, is it?

A. A timecard train.

(Testimony of A. G. Ferris.)

Q. And the numbers on the units were 6015 A B C and D? A. Yes, it was extra 6015.

Q. And the D unit was where?

A. D was the east unit. [83]

Q. The front unit of the train?

A. Yes, sir.

Q. Where were you stationed?

A. At what point on the railroad?

Q. As you proceeded toward the station of Arrow?

A. Between North Lapwai and Arrow I was on the west unit of the diesel?

Q. That would be in the A unit? A. Yes.

Q. Now did the train stop at North Lapwai?

A. That's right.

Q. And for what purpose?

A. To pick up some cars.

Q. And after you picked up the cars did Engineer Mely make an inspection of the air brakes?

A. He set the air and the train crew made the inspection.

Q. But he also aids in the inspection?

A. He sets the air.

Q. It is one of his duties? A. Yes, sir.

Q. And was he the type of man that followed out his duties in that respect?

A. Yes, he did.

Q. Before leaving East Lewiston, Idaho, did he make his usual air test?

A. That is performed by the employees that are on duty there. [84]

(Testimony of A. G. Ferris.)

Q. And he also makes an inspection of the engine?

A. He inspects the engine before he takes it off the round-house track.

Q. You worked with him how long?

A. We didn't work steadily,—that is the first trip that Mr. Mely made on the highball for quite some time, as I understand it.

Q. But you had worked with him before?

A. I had worked with him on the main line, of course.

Q. And was he the type of man who always made his inspections regularly?

A. In my estimation Al was a good engineer.

Q. And you also did the same thing as a brakeman? A. How do you mean?

Q. You assisted him in making the inspections?

A. Yes, that's true.

Q. After leaving North Lapwai you proceeded toward the station of Arrow?

A. That's right.

Q. And do you know what speed the train was traveling at? A. No, I do not.

Q. What is your best estimate?

Mr. McKevitt: This is cross-examination of his own witness and it is objected to.

The Court: He may answer that.

A. You want my estimate? [85]

Q. Yes.

Mr. McKevitt: At what point, Mr. Shone.

(Testimony of A. G. Ferris.)

Q. Proceeding from North Lapwai toward the station of Arrow?

A. That's too indefinite, I cannot answer that.

Q. Well, you were at a dead stop at North Lapwai? A. That's right.

Q. Was it necessary that you put on speed in order to go ahead? A. That's true.

Q. And it took time to pick up speed?

A. That's true.

Q. And it is an uphill grade?

A. I don't know what the grade is there.

Q. But it is an upgrade?

A. I don't know.

Q. The river flows toward Lewiston, doesn't it?

A. Yes, sir.

Q. So that is down grade?

A. Necessarily, but that doesn't mean that the railroad grade is down.

Q. But you were going upgrade from Lewiston? A. I don't know the track elevation.

Q. It was necessary for Mr. Mely to pick up some speed to take this train to Arrow?

A. Yes, sir. [86]

Q. Were you to pick up cars at Arrow?

A. Yes, sir.

Q. Was there anything unusual in the speed of the train that you noticed?

A. Not that I noticed, or was conscious of, no, sir.

Q. And you were in the fourth unit?

A. Yes, sir.

(Testimony of A. G. Ferris.)

Q. Was there a speedometer in the fourth unit?

A. That's right, there was.

Q. And a speedometer in the unit Mr. Mely was operating? A. That's right.

Q. And at the time you looked at the speedometer was there any excessive speed?

A. I never observed the speedometer.

Mr. McKevitt: We object to the form of the question, the term excessive speed.

The Court: He is a railroad man, he would know.

Mr. McKevitt: What I am talking about is this, he made the observation excessive speed; under company rules excessive speed at times could be ten miles an hour or could be five miles an hour, and again outside of yard limits, as the rules will show, that type of train could travel at a maximum speed of 30 miles an hour. [87]

The Court: But the rules wouldn't show how fast this train was traveling.

Mr. McKevitt: But he is talking about excessive speed and I don't know what rate of speed he means.

The Court: There is nothing before the Court as he has answered the question.

Q. Were you aware of anything wrong until the collision occurred?

A. My first intimation of anything unusual was when the air went into emergency.

Q. When the train is placed in emergency you would notice that? A. You hear it.

(Testimony of A. G. Ferris.)

Q. Do you know about where it was when it was placed in emergency? A. No, I do not.

Q. When it is placed in emergency is that something that causes excitement with the crew?

A. Not necessarily.

Q. Did it with you on that occasion?

A. No, sir.

Q. From the fourth unit do you keep a lookout?

A. I had turned the fireman's chair around and was headed east.

Q. You were headed east?

A. I was facing east. [88]

Q. From that fourth unit can you see ahead?

A. It is possible, however, you would have to hang out the window quite a ways.

Q. Your window is not extended out, but is flush with the car?

A. No, it isn't, it is flush with the whole train.

Q. Do you keep your head out of the window so you can see ahead?

A. Ordinarily, the head brakeman rides the operating unit but in this particular instance being as how there is only three seats in each operating unit cab, they were fully occupied by Engineer Mely, Brakeman Brown and Fireman Reisenbigler so I dropped back to the fourth unit and was riding there.

Q. After the collision occurred did you see Engineer Mely? A. I did.

Q. Where was he, just tell the jury?

A. To the best of my remembrance now, he was

(Testimony of A. G. Ferris.)

just about midway of the second unit of the diesel, lying face downward between the main line and the passing track, more on the main line than the passing track, what I mean is that the rails had been shoved over if I remember correctly.

Q. And he was opposite the second diesel unit of his own train? [89] A. That is true.

Q. Do you know whether he had jumped out or had been knocked out by the collision?

A. I don't know—he was lying there, that's all I know.

Q. And the train, at that time, when you saw Mr. Mely, was at a stop? A. That's true.

Q. How far would that be from his position on the train, where you saw the body?

A. As I understand it these units on a diesel are about 50 or 52 feet, I am not sure, but he was about in a midway position of the second unit of the 6015.

Q. He was found in the wreckage?

A. I found him there, yes.

Q. And was he alive? A. No.

Q. He was dead when you found him?

A. He was dead.

Q. Have you ever ridden up in the front of a diesel while Mr. Mely was the Engineer?

A. I have.

Q. What have you observed as to whether he was a cautious Engineer?

Mr. McKevitt: We object to that, your Honor, it is not what the general reputation was but what was his conduct there on that day. There is no

(Testimony of A. G. Ferris.)

contention [90] here that this man was a bad engineer.

The Court: He has already testified that he was a good engineer.

Mr. McKevitt: Certainly he was a good engineer.

Mr. Shone: You say he was.

Mr. McKevitt: If he wasn't a good engineer they wouldn't have him on the Northern Pacific.

Q. The cars that you picked up at North Lapwai were loaded cars? A. Yes, as I understand it.

Q. And you were to pick up cars at Arrow?

A. That's right.

Q. As you approached Arrow and before the collision occurred, were there, to your knowledge, any torpedoes exploded on the rails?

A. Not to my knowledge.

Mr. McKevitt: May we have the same objection we made to this question before, for the purpose of the record?

The Court: Yes, and he may answer.

Q. If there were torpedoes on the train were you in a position to hear them?

A. I would undoubtedly have heard them, yes.

Mr. Shone: That will be all.

Cross-Examination

By Mr. McKevitt: [91]

Q. Mr. Ferris, you are now a conductor?

A. I am working as a brakeman right now, however I am promoted to a conductor.

(Testimony of A. G. Ferris.)

Q. That is by virtue of seniority rules is it?

A. And examination, yes, sir.

Q. Now, on this day in question, immediately prior to the collision, you were riding in what unit?

A. The hind unit, let me clarify that—that is hearsay on my part that I was riding in the A unit because we don't pay any attention to whether the D unit or the A unit is ahead, but I understand that it is in the record that the D unit was the lead unit that day.

Q. You were riding in the last unit?

A. That's right.

Q. What was your position, were you sitting down? A. Yes, sir.

Q. Which way were you facing? A. East.

Q. Facing the direction the train was going?

A. That's right, sir.

Q. Did you have any duties to perform at that time?

A. Well, I observed when we left North Lapwai, whether or not we had sticking brakes or maybe we left a hand brake on or something like that, and I observed those things.

Q. I observed when Mr. Shone asked you with reference to what the engineer did at North Lapwai, you said that [92] the engineer doesn't make the inspection, that the crew makes them, is that true?

A. That is true.

Q. There were fifteen loads in that train, wasn't there? A. Yes, sir.

(Testimony of A. G. Ferris.)

Q. And there were three brakemen to make the inspection? A. That's right.

Q. And what did the inspection consist of?

A. At North Lapwai that particular day after we had picked up the cars off the passing track and came back on to the main line and backed to the caboose, why, engineer Mely whistled the air, which consists of one long blast——

Q. You say engineer Mely whistled the air; explain to us what that means?

A. When the cars are charged, in other words, when the main reservoirs are charged he can tell on his air guages on his engine and he sets the air and gets the exhaust from this automatic brake valve and sees that he is drawing air off the train line and then he whistles the air and then we observe whether or not the pistons are extended and whether or not the brakes are setting up.

Q. Is it correct to say that what you have to do is, before you start, you cut the air through the entire train?

A. That's right, however, them cars, as I understand it, were set up the evening before, and as I remember it, [93] brakeman Jewell made one air joint on the cut of cars that we picked up at North Lapwai.

Q. When you left North Lapwai, was that train connected up in proper running condition?

A. Yes, sir.

Q. So far as air and couplers and everything was concerned?

(Testimony of A. G. Ferris.)

A. We would not have gotten a release from the caboose had there not been air in the train line and had the brakes not been set up.

Q. Then your answer is that when it left North Lapwai it was in proper operating condition in accordance with the rules?

A. That is right, to the best of my knowledge.

Q. How many times have you been over this area on this line prior to the 11th of November, 1951?

A. I couldn't tell you exactly but I have been over it quite a number of times.

Q. By the way, you were subpoenaed here by the plaintiff? A. Yes.

Q. To appear here as a witness?

A. Yes, sir.

Q. Did you discuss this case with counsel for the plaintiff?

A. I talked to him, yes, sir.

Q. Which is perfectly proper.

A. Surely.

Q. You were also instructed by the railroad company to appear here? [94] A. I was.

Q. Mr. Ferris, what kind of a train was this—was it an extra train? A. Yes, it was.

Q. What do you mean by an extra train?

A. A non-scheduled train.

Q. A train that is not running on schedule?

A. That's true, not a timecard train.

Q. Not a timecard train?

A. Not on a timetable.

(Testimony of A. G. Ferris.)

Q. I am glad you said that because you referred to 661 and 662 as being timecard trains.

A. That is true.

Q. This was not a timecard train?

A. This was extra 6015.

Q. With reference to this torpedo question that Mr. Shone discussed with you. Do you know what type of train that was that this 6015 ran into?

A. We called it the Stites Logger, but it was an extra train as I understand it.

Q. It was an extra train? A. Yes.

Q. This accident occurred within yard limits did it not? A. It did.

Q. You have been examined on the rules, have you not?

A. I have, September 11, 1952, was the last time I took [95] the rules examination.

Q. Was there any requirement under the rules in effect on November 11, 1951, that required the conductor in charge of 1648 to either put out torpedoes, fusees or send out a flagman?

Mr. Shone: Just a moment, we object to that on the ground that it calls for a conclusion of the witness and invades the province of the jury, eventually the jury will be the one who will determine the duty of the crew of 1648 and also of 6015.

The Court: That is correct and the rules would be the best evidence.

Mr. McKevitt: If I may make this observation, Mr. Shone asked about the torpedoes, now, the only crew that would put out the torpedoes would be the

(Testimony of A. G. Ferris.)

crew of 1648, the train that was at Arrow. There would be no reason for asking about the torpedoes unless he is going to contend that it was the duty of someone on 1648 to put out the torpedoes.

The Court: That is not the question you asked—you asked if there was anything in the rules, and the rules would be the best evidence as to that. That would be a question for the jury later. I think you should put in the rules and not ask him what is contained in the rules. The rules themselves would be the best evidence. [96]

Mr. McKevitt: I see now, your Honor, how absolutely correct you are.

Mr. McKevitt: Do you agree that exhibit marked 24 for identification is the same as the one Judge Hyatt has?

Mr. Shone: It is not the same book but it is the same edition and is the operating rules that these men were operating under on November 11, 1951, we will agree on that, but not as to the materiality of these rules at this time. We agree that these are the rules and you need make no further showing on that.

Mr. Clements: And may it be admitted in evidence, on the basis of your statement.

Mr. Shone: I am going to object to its being admitted in evidence at this time.

The Court: We are just taking up a lot of time here, there is nothing for the Court to rule on. You have in your hand an exhibit which is admitted by Mr. Shone to be the rules controlling the opera-

(Testimony of A. G. Ferris.)

tions, now is there a rule in that book which had to do with extra 6015 on that date?

Mr. Shone: Objected to as not proper cross-examination.

Q. Mr. Ferris, was train 6015, on November 11, 1951, such a train that had to be operated at restricted speed [97] within yard limits?

Mr. Shone: We object to that as calling for the conclusion of the witness.

The Court: I think the objection is well taken, but he is a railroad man and in the interest of time I will let him answer.

A. It was an extra train, yes, it operated at restricted speed.

Q. It was required to be operated at restricted speeds?

A. That is true, according to the rules.

Q. What is meant by restricted speed?

A. Prepared to stop short of any obstruction.

Mr. McKevitt: That's all.

Redirect Examination

By Mr. Shone:

Q. In your opinion, at the time that the train was put into emergency was it being operated at restricted speed?

A. That I cannot answer.

Q. You cannot answer? A. That is right.

Q. Was it then being operated at what you would consider the usual speed along that line?

(Testimony of A. G. Ferris.)

Mr. McKevitt: Object to that, "the usual speed" is too indefinite a term.

The Court: I take it that the man who [98] was operating the train is dead, and he is presumed to have been operating it in a careful manner in accordance with the proper manner of handling trains and anything this man said would just be a guess on his part.

Mr. Shone: That is all.

Recross-Examination

By Mr. McKevitt:

Q. If that train had been operated at restricted speed within the yard limits at that time, it is a fact is it not, that there would not have been a collision?

Mr. Shone: We object to that as calling for a conclusion of the witness and invading the province of the jury.

The Court: In view of his former answer I will sustain the objection.

Mr. McKevitt: I would like to make an offer of proof outside the presence of the jury on cross-examination, as to what the witness would testify to.

The Court: I am about to recess anyway so the jury may retire.

Mr. McKevitt: The defendant offers to prove by cross-examination of this witness that if immediately prior to the collision in question, train 6015 operated by engineer Mely—if it had been operated at restricted speed under the rules of the company,

this collision would not have occurred. [99] It is already in evidence from plaintiff's own witnesses that this accident occurred within yard limits, and it is in evidence from plaintiff's own witnesses that within yard limits, a train must be operated at restricted speed and it is in evidence from the plaintiff's own witnesses that restricted speed means that the engineer must have such control of the train that he must be prepared to stop short of a train or any obstruction that may require the speed of the train to be reduced. It is our position that the question is proper and that this witness, if permitted to testify, he would testify, and would have to testify that if this train was operated at restricted speed that the collision would not have occurred.

Mr. Shone: We object to the offer of proof on the ground and for the reason that it calls for a conclusion of the witness and invades the province of the jury in deciding the ultimate question of fact to be decided in this case. We object to the statement and the offer of proof of what restricted speed is for the reason that the rule, which he has now read in his offer of proof, is not a statement of any particular speed as being restricted speed, no maximum speed is set forth either in the offer of proof or in the rule. Another ground; that the rules are not binding on the court or jury and in a final analysis of this case [100] it would rest upon the question of what a reasonable person would do under the same or similar circumstances, or what a reasonable person would not do under the same or similar circumstances.

The Court: This might be proper evidence in your case in chief, but I don't consider it proper cross-examination at this time. I am not ruling that he can't put that evidence in, but I am ruling that the testimony is not proper cross-examination, and the other I will rule on later if I have to.

Mr. Shone: We are going to base our case on a rule and when the proper time comes we will introduce the rule in evidence, and the defendants in their case may introduce any rule they wish, if proper.

Mr. McKevitt: He may offer some rule but if it is admitted it will be over my objection because he hasn't pleaded any rule violation.

The Court: We will recess for fifteen minutes at this time.

September 30, 1952—11:45 A.M.

Mr. McKevitt: No further cross.

Mr. Shone: That is all.

F. A. GRANGER

called as a witness by the plaintiff, after being first duly sworn testifies as follows: [101]

Direct Examination

By Mr. Shone:

Q. Where do you live, Mr. Granger?

A. Spokane, Washington.

Q. And your occupation?

A. Conductor on the Northern Pacific Railroad.

Q. And how long have you been working for the Northern Pacific Railroad?

(Testimony of F. A. Granger.)

A. Since 1910.

Q. You have had other positions than conductor, I presume?

A. I was a brakeman until 1917.

Q. Where were you working on November 11, 1951?

A. I was working on numbers 661 and 662 out of Spokane to Lewiston.

Q. And 661 is from Spokane to Lewiston, and 662 is from Lewiston to Spokane?

A. 662 is from Lewiston to Spokane, yes, sir.

Q. It is the same train but they change numbers; coming down it is 661 and going back it is 662?

A. Yes, sir.

Q. And the diesel engine you were working on was what? A. 6015.

Q. It had four units? A. It did.

Q. Now, you left East Lewiston, with the four units and caboose? A. Yes, sir. [102]

The Court: Gentlemen, just in the interest of time, I take it from what I have heard so far that everyone can stipulate that this train was mechanically perfect; in perfect running order and was properly inspected and it would be just a repetition in going over this train again up to the scene of the accident. Is that correct?

Mr. Shone: That is correct.

Mr. McKevitt: That is right.

The Court: If we can have that understood we can save a great deal of time, because there has been a great deal of evidence here concerning this train

(Testimony of F. A. Granger.)

prior to the time it arrived at the scene of the accident and there seems to be no dispute as to the condition of the train.

Mr. McKevitt: We will not pursue the question of the equipment or the condition of the brakes or anything of that nature, since it is admitted that there was nothing in dispute here.

The Court: I think we can go further with the stipulation, from what has been said by counsel we can stipulate that all the operators of the train were qualified, all the conductors and brakemen and others were properly qualified for the positions they were handling.

Mr. Shone: That is agreeable with us. [103]

Mr. McKevitt: And in addition to what has been said by his Honor, you will agree that Mr. Mely, on the day in question was thoroughly familiar with the operating rules as set out in the rule book.

Mr. Shone: We have already agreed to that.

The Court: Now, that has shortened this trial a great deal.

Q. Mr. Granger, when you left North Lapwai, did you have any orders to pick up cars at any other station?

A. At the Camas Prairie side track at Arrow, and the Northern Pacific track at Arrow.

Q. Siding tracks were they?

A. No, the one there is a storage track in the N. P. yard and the other is a side track on the Camas Prairie.

(Testimony of F. A. Granger.)

Q. One is called a side track and the other a storage track? A. Yes, sir.

Q. Do you know where the west switch is at Arrow? A. Yes, sir.

Q. And where in regard to the cars that you were going to pick up was the west switch?

A. The cars were at least three car lengths in the clear on the passing track.

Q. On that siding, is that a siding which is on the south of the track? A. Yes, sir.

Q. And how many cars were on that siding?

A. Fifteen cars. [104]

Q. Were you going to pick up those fifteen cars in your train? A. Yes, sir.

Q. And then you were to move from there up to the station and on the storage track pick up some other cars? A. Yes, sir.

Q. And you had orders to that effect?

A. Yes, sir.

Q. And where were your stations on this train before it reached the station of Arrow?

A. In the caboose, at my desk.

Q. And in the caboose, tell us if there is any instrumentality in the caboose giving you control over the train? A. Yes, sir.

Q. What is it? A. Emergency air brake.

Q. And with that emergency air brake you could stop the train? A. Yes, sir.

Mr. McKevitt: We object to this line of testimony because there is no charge in this complaint

(Testimony of F. A. Granger.)

that the man in charge of that train—that this man here was in anywise negligent.

Mr. Shone: We are not claiming that at all, the fact is just the opposite.

The Court: I can't see where this has [105] anything to do with this case.

Mr. Shone: Merely on speed, your Honor?

The Court: Go ahead, his answer is in the record.

Q. As you proceeded toward Arrow Station from North Lapwai, were you in the caboose at all times?

A. Yes, sir.

Q. What first directed your attention to anything being abnormal with your train?

A. When he dynamited the train.

Q. Who is "he"? A. The engineer.

Q. You never did dynamite that train?

A. No, sir.

Q. That was engineer Mely? A. Yes, sir.

Q. Where was it that he dynamited the train?

A. I think it was a little east of the west switch.

Q. When he dynamited the train, was there any other thing he could have done to bring it to a stop?

A. No, sir.

Q. Dynamiting it was all?

A. Yes, that is all.

Q. As you approached the west switch, was there anything unusual in the speed of your train? [106]

Mr. McKevitt: Object to the form of that question as leading and suggestive.

The Court: It is leading.

Q. Was there anything unusual as to the speed of the train?

(Testimony of F. A. Granger.)

Mr. McKevitt: The same objection, your Honor.

The Court: Yes—just ask him what the speed was.

Q. Do you know what the speed was?

A. Only what I heard.

Q. Of your own knowledge? A. No, sir.

Q. You have no knowledge of that?

A. No, sir.

Q. Do you have a speedometer in the caboose?

A. No, sir.

Q. As to the speed that would be for you to determine as of your own opinion? A. Yes.

Q. As conductor of the train? A. Yes.

Q. Did you have an opinion at that time?

A. I did.

Q. That is, before the emergency brake was applied? A. Yes.

Q. Is there any way that you could look out of the caboose? [107]

A. Only looking out the window and then you are looking far across, away from the train.

Q. Do you usually keep a lookout?

A. Yes, sir.

Q. You have other duties to attend to as a conductor? A. Yes, sir.

Q. And you are in charge of the train?

A. Yes, sir.

Q. You are ahead of the engineer on the train?

A. Yes, sir.

Q. Did you see Engineer Mely after the wreck?

A. Yes, sir.

(Testimony of F. A. Granger.)

Q. Where was he?

A. He was lying at the rear end of the rear diesel.

Q. That was in among the wreckage?

A. He was in between the wreckage, he wasn't in it.

Q. Was he alive or dead when you saw him?

A. He was dead when I saw him.

Q. Where was Brakeman Brown?

A. He was about eight cars west of Mr. Mely.

Q. Did you see him? A. Yes, sir.

Q. Was he alive or dead?

A. He was alive.

Q. He died afterward? A. Yes, sir. [108]

Mr. Shone: That is all.

Cross-Examination

By Mr. McKevitt:

Q. Just a few questions, Mr. Granger—back in that caboose as that train moved to Arrow, you had certain duties to perform? A. Yes, sir.

Q. Making up reports? A. Yes, sir.

Q. What kind of reports?

A. Reports of the cars picked up at Lapwai, the consist of the cars, the numbers and the weights and where from and where to.

Q. That engaged your attention completely, did it not?

A. Yes, sir, but I did glance up a couple of times.

Q. Now, you say that you have no knowledge of the speed, only what you heard, is that right?

(Testimony of F. A. Granger.)

A. Yes, sir.

Q. That's what you heard after the accident?

A. Yes, sir.

Q. Was there a speed tape on that locomotive that day? A. Yes, sir.

Q. You spoke about part of your duties on that train that day was to pick up cars at Arrow?

A. Yes, sir.

Q. Did you communicate that information to Mr. Mely? [109-10]

A. I told Mr. Mely at Lewiston and North Lapwai.

Mr. McKevitt: That's all.

Mr. Shone: That's all.

MRS. TILLIE MELY

called as a witness for the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Shone:

Q. Your name is what? A. Tillie Mely.

Q. What relation was A. E. Mely to you?

A. My husband.

Q. Where and when were you married?

A. At Sandpoint, June 20, 1942.

Q. That date was in 1942 that you were married?

A. Yes, sir.

Q. Where did you live with Mr. Mely?

A. At Spokane.

(Testimony of Mrs. Tillie Mely.)

Q. Did you live in Spokane with him during all of your married life? A. Yes.

Q. How old a man was Mr. Mely?

A. He would have been 55, December 8th.

Q. Of that year? A. Yes, sir.

Q. How old are you, Mrs. Mely?

A. I was 52 in September. [111]

Q. What kind of a life did you and Mr. Mely live in regard to your family life?

A. A very good life I would say.

Q. Was he a loving husband? A. Yes, sir.

Q. (By Mr. McKevitt): May I approach the bench with counsel?

The Court: Yes, you may.

(Conference between Court and counsel.)

Q. How did you and Mr. Mely get along during your married life? A. Just swell—very well.

Q. Did you go out socially? A. Yes.

Q. When you went out socially, were you accompanied by your husband? A. Yes.

Q. Were you always accompanied by your husband?

A. When he was in—when he was at home.

Q. Did you go to shows? A. Sure.

Q. While he was working——

The Court: Can you stipulate as to the earnings of this man at the time of his death?

Mr. Shone: Yes, I think so.

Mr. McKevitt: I believe we can. [112]

The Court: You may stipulate it into the record.

(Testimony of Mrs. Tillie Mely.)

Mr. Shone: It is stipulated between counsel that the gross earnings of A. E. Mely during the year 1949 was $5,404.67 or a monthly average wage of $450.39, and for the year 1950 that Mr. Mely's gross earnings were $6,065.69 or a monthly average of $505.48. For 1951 Mr. Mely's gross earnings was $5,376.15 to November 12, 1951, or an average monthly sum of $537.61.

Q. Out of Mr. Mely's monthly salary what did he do with it?

A. He generally cashed his check and he would take out what road money he needed, $25 or $30 a half and then turn the rest over to me for household expense and to put in the bank what we could.

Q. And out of the money that he gave you each month during the last year or two years, about how much of that money would be used necessarily for your support?

A. Well, including taxes and insurance and such, it took around $325 a month, so I figure it would take about half of that for me.

Q. How much would that be for you?

A. Around $150—60 or 70.

Q. Would that include your board and groceries and clothing and upkeep and necessities?

A. Yes, sir.

Q. All necessary incidentals?

A. That's right. [113]

Q. That $150 to $170 per month, was that necessary for your upkeep?

A. Yes, it would be when you include medical

(Testimony of Mrs. Tillie Mely.)

and dental expense, insurance and taxes, and fuel and so forth.

Mr. McKevitt: We admit all this.

Mr. Shone: Very well.

Q. And you were dependent upon your husband for your support? A. Yes, sir.

Mr. Shone: That is all.

Cross-Examination

By Mr. McKevitt:

Q. There were no children were there, Mrs. Mely? A. No, sir.

Mr. McKevitt: That's all.

Mr. Shone: Nothing further.

The Court: We will adjourn at this time until 1:30.

September 30, 1952—1:30 P.M.

MERLE C. MAURY

called as a witness for the Plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Shone:

Q. Mr. Maury, where do you live?

A. Spokane.

Q. How long have you lived in Spokane? [114]

A. 36 years.

Q. What is your business or occupation?

A. I am a conductor on the Northern Pacific Railroad.

(Testimony of Merle C. Maury.)

Q. How long have you been a conductor on the Northern Pacific Railroad?

A. I was promoted to Conductor in 1943.

Q. Have you acted as conductor a great portion of the time since then?

A. I would say off and on about half and half.

Q. Have you also been a brakeman?

A. Oh, yes, sir.

Q. What other positions have you held with the Northern Pacific?

A. At one time, it was in 1938, I was cut off on the road and I was pit foreman at Messa Pit, that is where they get gravel for the road.

Q. Any other positions?

A. No, that's all.

Q. During the time that you have been conductor for the Northern Pacific Railroad have you ever had an opportunity to be a conductor on the road—the Northern Pacific running from East Lewiston, Idaho, to Spokane, Washington?

A. Yes, sir.

Q. How long were you conductor, how many years?

A. It doesn't go by years, I would say on the trips I [115] have gotten off the extra board running as conductor since 1943, I couldn't name the trips.

Q. Have they been many or few?

A. Yes, I have caught many trips.

Q. In both directions?

A. Yes, both directions.

(Testimony of Merle C. Maury.)

Q. And the train that you acted as conductor on was what number?

A. Well, there was 661 west and 662 east.

Q. 662 east is going from Lewiston to Spokane? They call that east on the railroad?

A. Yes, sir.

Q. That would be a freight train?

A. Yes, sir.

Q. Extras? A. Yes.

Q. During the time that you have been a brakeman and conductor at any time did the Northern Pacific Railroad Company furnish you with a book of rules? A. Yes, sir.

Q. And when was that?

A. I first hired out in June, 1937.

Q. What were your instructions from your Company in regard to the book of rules?

Mr. McKevitt: We object to that question as being too general. [116]

The Court: He may answer.

A. Our instructions were that we were to be conversant with them and to understand them.

Q. Have you read the rules? A. Yes, sir.

Q. And are those rules known as the consolidated code of operating rules and general instructions? A. Yes, sir.

Q. During the course of your occupation as a brakeman and conductor did you stand any examinations on those rules by the Company officials?

A. Yes, sir.

Q. Over a course of what period?

(Testimony of Merle C. Maury.)

A. Well, since June of 1937, I believe I have taken six and possibly seven examinations.

Q. Are those examinations that you have taken on the rules before an examining board of the railroad Company or an inspector or something like that?

A. Yes, we have a man who is termed a rules examiner, appointed by the Company for that purpose.

Q. And he is the man who examines you on the rules? A. Yes, sir.

Q. And during the six or seven examinations you have taken, have you passed the examinations?

A. Yes, sir. [117]

Q. Did you flunk in any one of the examinations? A. No, sir.

Q. And by "flunk" I mean were you turned down? A. Never.

Q. And you are now familiar with the rules?

A. Yes, sir.

Q. And you now operate under the rules?

A. Yes, sir.

Q. Are you familiar with the stations, east of East Lewiston, Idaho? A. Yes, sir.

Q. Are you familiar with the station called Arrow? A. Yes, sir.

Q. And are you familiar with the yards of that station? A. Yes, sir.

Q. Now, when you were conductor or whenever you are conductor on that particular line, the train known as 662, is that a scheduled train?

(Testimony of Merle C. Maury.)

A. Yes, sir.

Q. And by scheduled train what do we mean?

A. Well, it's a train that runs on timetable schedule, the time is marked for each station and the time is naturally from your leaving station to the arriving station.

Q. Is that schedule put out by the Company in printed form? A. Yes, sir. [118]

Q. Referring to the Plaintiff's exhibit marked for identification number 23, I will ask you to state to the jury what that is?

A. This is Northern Pacific Railway Company, Idaho Division, timetable 75B.

Q. Are you familiar with that timetable?

A. Yes, sir.

Q. Did that cover the same period of time that is involved in this action—this accident, which occurred on November 11, 1951? A. Yes, sir.

Mr. Shone: I offer this in evidence.

Mr. McKevitt: I object to that as incompetent, irrelevant and immaterial.

The Court: It may be admitted.

Q. Referring to the schedule—what time was train 662 scheduled on its daily run from East Lewiston, Idaho, going east?

Mr. McKevitt: Objected to as incompetent, irrelevant and immaterial, for the reason that the train he mentioned is not involved in this action in any way.

The Court: The exhibit itself is the best evidence.

(Testimony of Merle C. Maury.)

Mr. Shone: May I ask the witness to read from the timetable?

The Court: It is admitted in evidence [119] and you would have a perfect right to read it to the jury yourself.

Mr. Shone: May I do that now?

The Court: Yes, you may.

Mr. McKevitt: Your Honor has overruled my objection?

The Court: Yes. However, I don't know whether this is material or not.

Mr. Shone: "Leaves Lewiston at, 12:30 p.m."

Mr. McKevitt: What train, Mr. Shone?

Mr. Shone: 662.

Q. Is that correct? A. Yes, sir.

Q. Now, when train 662, is at East Lewiston, Idaho, ready for its scheduled run, are there times when they put that train 662 out as an extra?

A. Many times.

Q. Tell the jury what an extra is—what is meant by an extra train?

A. An extra train has no class—I mean by that, it has no schedule. It can run any time, on any track in any direction under orders, what we term train orders. It cannot leave its initial station without orders.

Q. When 662, which is scheduled for 12:30 p.m., is put out as an extra does it carry a flag designating it to Be an Extra, in Railroad parlance? [120]

Mr. McKevitt: Objected to as incompetent, irrelevant and immaterial.

(Testimony of Merle C. Maury.)

The Court: He may answer.

A. Yes, sir, it does.

Q. What kind of a flag?

A. It carries two white ones on the fore part of the engine two and a half feet to three feet above the headlight.

Q. Now, when the extra leaves the station at East Lewiston, as an extra, then does the scheduled train go out at 12:30 p.m.?

A. No, sir, it does not.

Q. There is only one train there, is that right?

A. Yes, sir.

Q. And if it goes out as an extra, then the train does not run on schedule? A. That's right.

Q. And no other train is put out on schedule?

A. No, sir.

Q. Can you tell the jury the custom of the Railroad Company in putting out trains as an extra, not as schedule trains—if there are particular days that your Company would do that?

Mr. McKevitt: Objected to as incompetent, irrelevant and immaterial and not in issue in this case. [121]

The Court: He may answer.

A. Well, of course, I have worked there a long time, and it's been my common belief that on Sundays they run extras, because they don't have to wait for stock or merchandise off the branch lines; there would be no reason, as I understand it, to hold them there for such.

(Testimony of Merle C. Maury.)

Q. Do they usually put out extras on Sundays, where they do not on week days?

A. Yes, sir, that's right.

Q. That has been a course of conduct?

A. Yes, sir.

Q. You mentioned stock and merchandise, and they put out these trains on Sundays because, there is no stock or merchandising, what do you mean by that?

A. What I mean by that—they don't have to wait for it to come in off the lines.

Q. Let me ask you this—do the workmen work seven days a week?

A. On the Camas Prairie Railroad, no—most of the jobs on the Camas Prairie are six day week jobs.

Q. The Camas Prairie operates over the N P lines? A. Yes, sir.

Q. From what station to what station?

A. East Lewiston to Arrow.

Q. And at Arrow where does the Camas Prairie line go? [122]

A. At Arrow the Camas Prairie line goes to Stites and out of Orofino they have another branch that goes to Headquarters.

Q. Where does the N P line go from Arrow?

A. Spokane.

Q. After they leave Arrow, are these two separate railroad branches? A. Yes, sir.

Q. And do they go in different directions?

A. Yes, sir.

(Testimony of Merle C. Maury.)

Q. You are familiar with the yards and yard limits of Arrow? A. Yes, sir.

Q. What designates the yard limits of Arrow, going east?

A. Yard limit board that has the words on it "yard limit."

Q. As conductor where do you usually stay?

A. In the Caboose.

Q. Is that the place where you are supposed to stay?

A. Yes, sir, I would say that you have a lot of work to do lining up trains and stuff.

Q. Mr. Maury, you have been sitting in Court all the time during this trial? A. Yes, sir.

Q. Near Counsel table? A. Yes, sir. [123]

Q. And you have heard all the witnesses testify that have testified in this case so far?

A. Yes, sir.

Q. You have heard them discuss the features of the yard at Arrow? A. Yes, sir.

Q. Are you familiar with the south siding near the west switch? A. Yes, sir.

Q. Are you familiar with two curves just west of the west switch? A. Yes, sir.

Q. Are you familiar with what is known as a logging train? A. Yes, sir.

Q. Have you seen them on the railroad tracks between East Lewiston and Arrow stations?

A. Yes, sir.

Q. Frequently? A. Yes, sir.

Q. How high are these logging cars?

(Testimony of Merle C. Maury.)

A. Three and a half feet.

Q. Are they about as high as what we call a flat-car? A. Yes, sir.

Q. Is a caboose as high as a boxcar?

A. As high as a forty foot boxcar, yes, sir. Almost as high, maybe there is a few inches difference, I would say [124] the caboose is lower.

Q. You heard the testimony here as to where train 1648 was, upon the main track?

A. Yes, sir.

Q. The engine at the station house?

A. Yes.

Q. And the caboose, 604 feet east of the west switch? A. That's right.

Q. And you heard the testimony——

Mr. McKevitt: I object to that, your Honor. I don't think is permitted to say to the witness "you heard this testimony and you heard that testimony." This witness might form one impression as to what he heard and Mr. Shone might have another impression. I object to the form of the question.

The Court: He hasn't asked whether that testimony is true or false of anything of that kind.

Mr. Shone: I will put a hypothetical question to the witness when I have finished.

The Court: You may proceed.

Q. You heard the testimony about the 15 boxcars parked on the south siding just east of the west switch? A. Yes, I did.

Q. You heard by stipulation of counsel read in

(Testimony of Merle C. Maury.)

open Court, that from the rear of the caboose on the main line track, to the rear of the west car—boxcar on the south siding was 346 feet? [125]

Mr. McKevitt: I must object to this method of examination—counsel saying to the witness "you heard this" and "you heard that." If this is for the purpose of establishing a basis for a hypothetical question, I have never heard of it.

The Court: This is a stipulated fact and I don't see any necessity of asking this witness.

Mr. Shone: I wasn't sure that he heard it.

Q. Now, Mr. Maury, under the facts as presented here in the Courtroom, under what rule, in your opinion, would you proceed in protecting, if necessary, within the yard limit at Arrow Station?

Mr. McKevitt: I object to that question on the ground that it is not properly framed and I object to it on the second ground that it is an attempt to establish a rule violation by the Northern Pacific Railroad Company, which rule violation will probably be urged as the cause of Mr. Mely's death, when that rule violation has not been pleaded in the complaint. As I pointed out to your Honor, there are twelve separate subdivisions of negligence contained in paragraph five of this complaint, and not in one of them, nor in any place in this complaint have we ever been apprised, until this moment, that the Northern Pacific was going to be charged with this man's death because of a violation of a rule which the Northern Pacific had established for [126] this man's protection.

The Court: The last part of your objection will

(Testimony of Merle C. Maury.)

be overruled; the first part will be sustained. I think the proper way to ask this question would be to assume certain facts and then ask it.

Mr. Shone: May I ask the Court if the Court is holding the complaint sufficient for the introduction of rules, if not I intend to ask leave to amend.

The Court: I am of the opinion that the allegations are sufficient, however, I will leave it up to counsel whether or not he desires to make any amendment.

Mr. Shone: In order to obviate any question, the plaintiff will now ask leave of the Court to amend subdivision 12 of paragraph 5, by adding thereto and at the end thereof at page five, "and defendant's negligent violation of its own operating rules."

Mr. McKevitt: If your Honor please, if you will examine the books there are 997 rules, which one, Mr. Shone, did we violate, according to you?

Mr. Shone: We will make proof of that.

The Court: It may be amended with the understanding that under the rules of discovery if counsel desires to submit to you any interrogatories in regard to just what rule or rules, that you will answer [127] them.

Mr. Shone: Yes, I will your Honor.

Q. Mr. Maury, assuming the following facts to be true; that on November 11, 1951——

Mr. McKevitt: May I interrupt a moment. I want to be acquainted with the thought in your Honor's mind in permitting the amendment, and

(Testimony of Merle C. Maury.)

granting defendant permission by interrogatories of some kind or other to request the plaintiff to designate the rule or rules which he claims were violated.

The Court: That's right.

Mr. Shone: I am prepared to give him that now. Do you want it now?

Mr. McKevitt: Sure, then we are through with that.

Mr. Shone: Rule 99, rule 101 and rule 108.

Mr. McKevitt: It is understood for the purpose of the record that the Northern Pacific Railway Company, defendant, objects to this amendment to include any rule viloation of rules 99, 101, or 108, for the reason and upon the grounds that there is no allegation in the complaint that we violated any rule or rules, and that this comes as a matter of surprise to this defendant.

The Court: I will permit the amendment and if counsel desires further time to meet the amendment you [128] will be given an opportunity to do so.

Mr. McKevitt: Your Honor will appreciate my position here, frankly, I just have a hazy recollection of what rule 99 is—I don't know rule 101 or 108 from Adam's off ox because, I didn't know we were going to be charged with a violation.

The Court: You can think it over and if you need any time to get any witnesses, I will give you time.

Q. Now, assuming as true the following facts, that on November 11, 1951, extra train 1648 left

(Testimony of Merle C. Maury.)

East Lewiston at 10:35 a.m., and proceeded easterly into the yards and to the Station at Arrow in the State of Idaho, and while at Arrow the crew switched cars onto the main single line track within the station yards and built up a train of 85 cars with a caboose at the west end thereof, and with a locomotive at the east end thereof, standing upon the track in front of the Station house; that at that time and immediately before, there was on the south side of the track a siding which contained 15 box-cars which were about 346 feet—that is, the most westerly car of the boxcars on the siding were about 346 feet west of the caboose on the main line; that the 85 cars and caboose were stationary; that that train had been in the yards for about 25 minutes; that just west of this caboose standing on the main line, 604 feet, was [129] a switch; that west of the switch commences a curve and looking at the curve it is a left curve and then it goes into a right curve around a cliff; that the railroad has no block system between East Lewiston and Arrow station; that this was a Sunday, in which there was no knowledge on the part of that crew, stationed within the yards, that a train had left East Lewiston that morning, following their train, and with the knowledge that extras do run over that track on Sundays, under those circumstances and the further fact that the end forty or sixty cars of the 85 cars standing on the main line track were logging cars, about as high as an ordinary flatcar. Under those circumstances what, rule in your opinion, of the Consolidated code

(Testimony of Merle C. Maury.)

of operating rules and general instructions of the Northern Pacific Railway Company would be applicable?

Mr. McKevitt: I desire to object to the hypothetical question on the following grounds:

1. They have injected into this case issues not contained in the complaint.

2. That they have not sufficiently qualified this witness to testify on the matters and things contained within the hypothetical question.

3. That this witness is not qualified to testify what rule is applicable and what rule is not applicable.

4. There has been no evidence introduced here which would indicate in any manner that a rule violation [130] by the Company was or could have been the proximate cause of this man's death. If the objection is not well taken, or any portion of it, in addition, I object to the form of the question as not containing all of the factors required in a hypothetical question under the conditions as they exist. Now, if the objection is not well taken I desire to examine the witness on voir dire.

The Court: The objection will be overruled.

Mr. McKevitt: May I examine the witness on voir dire?

The Court: You may.

Q. (By Mr. McKevitt): Mr. Maury, how old are you? A. 36.

Q. You have been employed by the Northern Pacific since 1937? A. Yes, sir.

(Testimony of Merle C. Maury.)

Q. Continuously?

A. Except for periods in 1937 and 1938, while I was—what we term, cut off the board, due to lack of seniority.

Q. You were cut off the board due to lack of seniority in 1937 and '38? A. That's right.

Q. And when you speak of seniority, you are speaking of rights that you have over other men who are in service a lesser time than you? [131]

A. That's right.

Q. What rights have you at the present time with the Northern Pacific, as a conductor?

A. Well——

Q. ——What is your seniority rating?

A. I would say right now I am about two men from the conductors extra board.

Q. Right now you are two men from, meaning away from? A. Yes.

Q. From the conductors extra board?

A. Yes, sir.

Q. What does that mean?

A. The Conductors extra board is like the Brakemens extra board, only on the Conductors extra board you have a guarranty of so many miles per month, what I mean by miles—I mean wages, I believe it is 3000 miles.

Q. You say you believe, don't you know?

A. Yes, I know.

Q. What is the fact? A. It is.

Q. 3000 miles? A. Yes.

(Testimony of Merle C. Maury.)

Q. You use the figure 3000 miles, what do you mean by that?

A. It means that you are paid—the rate of pay is classed so much per hundred miles. [132]

Q. In other words——

A. In other words, a day's pay.

Q. In other words, before you can get the position you are talking about, there are two men ahead of you, is that what you mean?

A. No, sir—it's pretty hard to explain but I will do my best—it means that—a conductor's extra board is just the same as a regular conductor's job whether you are on a main line job or a local, it is still a regular job as a conductor, but they can reach down on your job as we call it, if you are holding a regular job braking on the local or the main line freight, they can reach down and use you as a conductor. Sometimes it might be two weeks or even longer before you return to your own job as a brakeman.

Q. Have you finished your answer?

A. Yes, sir.

Q. Your period of employment during 1937, was fifteen years ago? A. Yes, that's right.

Q. What type of work did you begin with?

A. Brakeman.

Q. How long did you work as a brakeman, beginning in 1937?

A. I was promoted, after rules examination, in 1943 to a conductor. After that I was eligible to run as a conductor. [133]

(Testimony of Merle C. Maury.)

Q. In other words you were promoted by virtue of an examination in 1943——

A. That's right.

Q. And under these rules you had the information that qualified you to run as a conductor, isn't that true? A. That's right.

Q. But between 1937 and '43 you had never run as a conductor? A. No, sir.

Q. Now, after 1945, after you had passed this examination, when did you first run as a conductor?

A. I haven't the record, but I think it was 4 or 5 days after the examination.

Q. And what was your run?

A. I can't remember, I expect it was main line freight.

Q. That has no connection with this branch?

A. No, sir.

Q. How long did you run as a conductor beginning in 1943?

A. Off and on, I would say all during the war sir, and up until well in 1945.

Q. You say, off and on, you mean you would run sometimes as a conductor and somebody would have more seniority than you and bump you and you would run as a brakeman, is that right?

A. Well, the same thing, yes, sir.

Q. Have you been running as conductor, beginning with 1951, November 11, the date of this accident, had you [134] been running as a conductor? Had you been regularly running as a conductor?

A. No, sir, off and on.

(Testimony of Merle C. Maury.)

Q. Now, what do you mean by "off and on"?

A. On account of my job—the Coeur d'Alene local I might be a brakeman for one day, that is a one day job, and the next day I might catch a run on the chain gang or a local or something of that sort.

Q. When was the last time you ran as a conductor on any line of the Northern Pacific?

A. I think sir, it was around the 10th or 12th of February.

Q. 1952? A. Yes, sir, 1952.

Q. Did I understand you to say that you have run as a conductor of the P & L branch, where this happened—a freight conductor?

A. Where this happened?

Q. Yes, have you run as a freight conductor over this line? A. Oh, yes.

Q. Prior to this accident? A. Yes, sir.

Q. On how many occasions?

A. On 661, I couldn't name the times, I can't remember, it was over a period of years.

Q. Now, the question has been put to you, do you know what [135] rule counsel is referring to?

A. Rule 99.

Q. Is that the rule he is referring to?

A. Yes, sir.

Mr. McKevitt: No further questions on voir dire.

(Testimony of Merle C. Maury.)

Direct Examination
(Continued)

By Mr. Shone:

Q. Now will you answer the hypothetical question—do you remember the question I put to you?

A. Yes, I think I do.

Mr. McKevitt: I have already made my objection on several grounds.

The Court: Yes, you have, go ahead.

Q. What rule, in your opinion, would govern that situation?

A. Could I explain in my own words?

Q. You just tell me what rule first?

The Court: I think you should let him explain it in his own words.

Mr. Shone: Yes, O.K.

A. In various examining cars I have been in, oral examinations and written examinations, they always stress one point, that is rule 108.

Mr. McKevitt: Your Honor, I object to this as not responsive, he was asked what rule would govern.

The Court: I believe I will let the witness go ahead. [136]

A. The reason I referred to rule 108, it is the rule that says in case of uncertainty or doubt follow the safe course. Well, that's a general rule, whenever in case of uncertainty or doubt you follow a specific rule which is 99 the flagging rule to protect your own train.

(Testimony of Merle C. Maury.)

Q. And that is the rule you would have followed, in your opinion, under these circumstances?

A. Yes, sir.

Mr. Shone: We offer in evidence rule 99.

Mr. McKevitt: We object as incompetent, irrelevant and immaterial and not within the issues.

The Court: It may be admitted and you may read it into the record.

Mr. Shone: Rule 99 of the consolidated code of operating rules and general instructions found on page 48.

Mr. McKevitt: That does not apply.

Mr. Shone: Just a minute, it is page 47, Rule 99: "When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with the flagman's signals a sufficient distance to insure protection, taking two torpedoes and when necessary, in addition displaying lighted fusees, and when recalled and safety to the train will permit, he may return. When conditions [137] require, he will leave the torpedoes and a lighted fusee. When a train is moving under circumstances in which it may be overtaken by another train, the flagman must take such action as may be necessary to insure full protection, by night or by day, when the view is obscured lighted fusees must be thrown off at proper intervals. When day signals cannot be plainly seen owing to weather or other conditions, night signals must be used. Conductors and Engineers are responsible for the protection of their trains."

(Testimony of Merle C. Maury.)

Q. Now, you spoke of a general rule, 108; would that as a general rule be applicable under the facts as I have stated them to you?

Mr. McKevitt: Objected to as incompetent, irrelevant and immaterial and for the additional reasons heretofore stated.

The Court: He may answer.

A. Yes, sir.

Mr. Shone: We offer in evidence rule 108 of the consolidated code of operating rules and general instructions.

Mr. McKevitt: We object to that as incompetent, irrelevant and immaterial and not within the issues of this case.

The Court: It may be admitted.

Mr. Shone: Rule 108 of the consolidated code of operating rules and general instructions found on page [138] 55 is as follows——

Mr. McKevitt: May I inquire does this rule have a separate number as an exhibit?

The Court: I was proceeding a little differently, I was having him read them into the record. I think the book is in evidence.

Mr. Shone: The book is in evidence as exhibit 24. This is your exhibit.

Mr. McKevitt: Not my exhibit, I tried to get it in but they wouldn't let me.

The Court: The clerk advises me that it was marked as your exhibit, and it may be admitted.

Mr. Shone: Rule 108——

Mr. McKevitt: So far as the record is concerned,

(Testimony of Merle C. Maury.)

is that book admitted as a defendant's exhibit? If that is the proposition then I object at this time because he is introducing certain rules there that we say do not apply. If your Honor is going to rule that it is admitted as Plaintiff's exhibit that's all right, but I am not conceding that the book and those rules that he has now offered go in as a defendant's exhibit. I am bound by those rules if I admit that.

The Court: I don't want to get too much confused myself. We will show that it is plaintiff's exhibit as to these two rules and these two only, and it is admitted. [139]

Mr. Shone: I quote the rule: "In case of doubt or uncertainty the safe course must be taken."

Q. Are there any other rules in this rule book that we are speaking about which in your opinion would govern the circumstances and facts as I have stated them to you?

Mr. McKevitt: I want to object to the form of the question and object to it on the ground that it is vague and uncertain and on the ground that it is not within the issues of this case.

The Court: He may answer.

A. Yes, there would be another one.

Q. What one? A. Rule 101.

Mr. Shone: We offer in evidence rule 101.

Mr. McKevitt: We object on the grounds previously stated with reference to the other rules.

The Court: It may be admitted and you may read it into the record.

(Testimony of Merle C. Maury.)

Mr. Shone: Rule 101 which plaintiff has offered as an exhibit and found on page 50, of the consolidated code of operating rules and general instructions reads as follows: "Trains must be fully protected against any known condition not covered by the rules, which interferes with their safe passage."

The Court: For the purpose of the record you will have to pick those rules out and mark [140] them individually as offered and admitted.

Mr. Shone: You may cross-examine—that is all.

Cross-Examination

By Mr. McKevitt:

Q. Will you look at that exhibit? Mr. Maury, by virtue of the examination which you say that you have passed in connection, with the operating rules, you feel that you are acquainted with them, do you not? A. Yes, sir.

Q. Do you know how many railroads have adopted the Consolidated code of operating rules and general instructions?

A. In this territory out here, I believe it is five.

Q. Will you name the Companies?

A. Chicago and Milwaukee; Union Pacific; Northern Pacific; the Great Northern and the SP&I.

Q. And it is your understanding then, that those Railroads after discussion among the various operating officials in this particular territory—the northwest territory—have agreed that these are

(Testimony of Merle C. Maury.)

standard rules and should be adopted for Railroad operation? A. That's right.

Q. For whose benefit are those rules promulgated and adopted?

A. I would say for the benefit of the employees and also for the benefit of the Company. [141]

Q. And for the benefit of the public generally?

A. That's right.

Q. Now, on page three of that book is shown the Railroads that operate under those rules?

A. That's right.

Q. And that edition is 1945? A. Yes, sir.

Q. And it states therein on page 3 as follows: "Rules herein set forth govern the Railroads as operated and listed below: To take effect December 1, 1945, superseding all previous rules and instructions inconsistent therewith. Special instructions may be issued by proper authorities." Is that right? A. Yes, sir.

Q. What is meant by special instructions?

A. Special instructions is a card used in conjunction with your timetable schedule outlining the physical characteristics of the road, bridges, slow orders, curves, speed restrictions, anything pertaining to the safety of the train.

Q. In other words—correct me if I am wrong—are in addition to the general rules set forth in the code? A. Yes, sir.

Q. And on page three it enumerates the Railroads and the various officials of those companies agreeing thereto? [142] A. That's right.

(Testimony of Merle C. Maury.)

Q. Now, kindly turn to page 5. There is listed there a general heading "General Rules" is that correct? A. That's right.

Q. Now, turn to page 6 please. At the bottom of page 5 first——

The Court: I call counsel's attention to the fact that the rules have not been introduced in evidence.

Mr. McKevitt: I desire to introduce defendant's exhibit 24, as a part of the cross-examination of this witness, but by virtue of its introduction I do not want the record to indicate that we feel that we are bound by the provisions of rules 99, 101 and 108. With that understanding I offer this exhibit as defendant's exhibit, As a Part of the cross-examination of this witness.

Mr. Shone: We have no objection.

The Court: It may be admitted.

Q. Will you please read to the Court and Jury, subdivision M, on page five under the heading "General Rules." Read it clearly and distinctly, please?

A. "Employees must exercise care to prevent injuries to themselves or others by observing the condition of equipment and the tools which they use in performing their [143] duties, and when found defective, when practical will put them in safe condition, reporting defects to the proper authorities."

Mr. Shone: Now, we move to strike the testimony of this witness in regard to general rule M, on the ground that it is not proper cross-examination; that we have previously agreed that the equipment

(Testimony of Merle C. Maury.)

and tools were safe on this particular day and on this particular train, and has no application to the case at this time.

The Court: I think that is right.

Mr. McKevitt: I think so, too, your Honor.

Q. Now, will you kindly read the next paragraph there on page 6?

The Court: The last answer may be stricken.

A. They must inform themselves of structures or obstructions where clearances are close.

Q. "They" refers to Railroad employees?

A. Yes, sir.

Q. "They must inform themselves as to the location of structures or obstructions where clearances are close." That rule, of course, was in effect at the time of this accident, wasn't it?

A. That's right.

Q. Now, go to the next one.

A. "They must expect trains to run at any time, on any track in either direction." [144]

Q. "They must expect trains to run at any time, on any track in either direction," that word they, then, referred to Mr. Mely, on November 11, 1951?

A. Yes, sir.

Q. You are acquainted with the fact are you not, that 6015 was an extra? A. Yes, sir.

Q. That is a train classification—when you call a train an extra, it means that it is a different type of train than some other type of train?

A. Yes, sir, it means that it is not running by timetable schedule.

(Testimony of Merle C. Maury.)

Q. It means that it does not run by timetable schedule? A. Yes, sir.

Q. If I understand your testimony, and you correct me if my statement isn't accurate—it is to the effect that on the day in question, the Northern Pacific violated rules 99, 101 and 108?

A. Yes, sir.

Q. Now, when you say the Northern Pacific violated, Rule 99, that is just a broad statement—the Northern Pacific, what man on the Northern Pacific violated rule 99?

Mr. Shone: We object to that as calling for a conclusion of the witness. Under the law it is immaterial—the men who were working for either crew, on engine 6015 or 1648, were servants and agents [145] of the Northern Pacific, and it is pleaded in the complaint and it is admitted in the answer that those two crews were servants and agents of the Northern Pacific Railway Company——

(Further remarks of Court and Counsel.)

The Court: I want this whole matter before the jury. I will let the witness answer. I don't doubt, Mr. Shone, but what you have some authority to submit on this question, but I will permit him to answer—he has qualified here as an expert on railroading. You may read your rule 99.

Q. Now, read rule 99.

A. "When a train stops under circumstances in which it may be overtaken by another train, the

(Testimony of Merle C. Maury.)

flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fusees. When recalled and safety to the train will permit, he may return." Shall I go on?

Q. Yes, go on.

A. "When the conditions require, he will leave the torpedoes and a lighted fusee. The front of the train must be protected in the same way when necessary by the forward brakeman, fireman or other competent employee. When a train is moving under circumstances in which it may be overtaken by another train, the flagman must take such action as may be necessary to insure full [146] protection. By night, or by day when the view is obscured, lighted fusees must be thrown off at proper intervals. When day signals cannot be plainly seen, owing to weather or other conditions, night signals must be used. Conductors and engineers are responsible for the protection of their trains."

Q. Now, answer my question please.

(Question read by reporter.)

Mr. Shone: May I have the same objection?

The Court: Yes, and he may answer.

A. I would say any competent employee on the hind end of that train.

Q. What train? A. 1648.

Q. That is the train that was in charge, as you well know, of conductor Eddie Feehan, was it not?

(Testimony of Merle C. Maury.)

A. Yes, sir, I knew him well.

Q. The brakeman operate under his instructions, do they not? A. That's right.

Q. If there was a duty to obey this rule, then that question was up to Eddie Feehan to see that it was done, is that right? A. Yes, sir.

Q. Then it is your testimony to this jury that Eddie Feehan was responsible for that wreck?

A. I knew Eddie Feehan very well—he was a good friend of mine—— [147]

Q. My question is—is it your opinion as an expert on these rules that Eddie Feehan was responsible for his own death, Mely's death and Brown's death and the injuries to these other people and the destruction of all this property—is that your opinion? A. Not altogether, no, sir.

Q. State whether or not it is your opinion, that Eddie Feehan, the conductor in charge of train 1648, was responsible for this collision?

Mr. Shone: We object to that—the witness has already answered the question.

The Court: The court recognizes that the witness is in a hard position. He will have to answer the question.

A. All right—yes.

Q. Now, Mr. Maury, will you turn to page 44 of the rule book—do you have the page?

A. Yes, sir.

Q. It is your understanding, is it not, that this unfortunate collision occurred within yard limits?

A. Yes, sir.

(Testimony of Merle C. Maury.)

Q. What, as an experienced conductor—brakeman and conductor—is meant by yard limits?

A. It means that a train working inside of those limits does not have to protect against other [148] trains.

Q. And when you say a train working within yard limits does not have to protect against other trains, you are referring, are you not, to train 1648, Eddie Feehan's train? A. That's right.

Q. And you are referring to the fact that it was not incumbent upon him, under the rules, to protect his train against extra 6015, isn't that right?

A. In a way, yes.

Q. Totally yes. Now, will you kindly read rule 93?

A. "Within yard limits the main track may be used clearing first class trains when due to leave the last station where time is shown. In case of failure to clear the main track, protection must be given as prescribed by rule 99. Within yard limits the main track may be used without protecting against second or inferior class, extra trains and engines."

Q. Just a moment, stop there. "Within yard limits the main track may be used without protecting against second and inferior class, extra trains and engines." That rule was in effect November 11, 1951, was it not? A. Yes, sir.

Q. Both of these trains were within the yard limits, as you know? A. Yes.

(Testimony of Merle C. Maury.)

Q. What is meant by the language "against extra trains"? [149]

Q. "Protect against extra trains," or "without protecting against extra trains" means that you don't have to have a flagman out.

Q. That means that it was not the duty of Eddie Feehan to send any brakeman back to put out a fusee, or a flare or a torpedo on the day in question?

A. That's right.

Q. Having in mind that answer, do you still want to adhere to Your Previous Testimony That Eddie Feehan was responsible for those three deaths?

A. I believe I answered that; I said "not altogether." I Think I can explain that answer.

Q. Was he partially responsible for the death of those people, for the death of Mely and Brown?

A. Yes, sir.

Q. If he didn't have to send back a flagman and if he wasn't required to put out a fusee or flare or torpedo then he was obeying the rule, wasn't he?

A. Yes, he was.

The Court: He asked to explain his answer and I will permit that.

Mr. McKevitt: Yes, if he wishes to.

Q. Now, explain your answer, you say "not altogether"?

A. It has been our practice up in the Idaho Division, on the various branches, and I might say, when I say it has been that way up there, I worked on the Camas [150] Prairie, years, and we have been told in examining Cars Also, I think they term it

(Testimony of Merle C. Maury.)

"create a hazard," and I can name various times and various towns we have been switching in, especially in handling a great amount of cars—I can say this as a fact, we always——

Q. Are you speaking now of the P & L branch where this accident happened? A. Yes.

Q. At this section point in Arrow?

A. No; I am not speaking of that.

Mr. McKevitt: Then I object to his explanation in that regard, your Honor.

The Court: He may complete his answer.

A. We have found it always a safe practice to put down two torpedoes, especially if you know there is an extra pretty close on that line, just to save ourselves and put ourselves in the clear, not only that, but to protect the other engineer, too. It's what I think they term "good railroading."

Q. You know the circumstances that obtained here? A. Yes, sir.

Q. Now, just assume that you were similarly placed, as was Eddie Feehan—by the way, do you know that that train was about to move out of Arrow, that the air was cut in, the Engineer was in the cab and they were about to depart? [151]

A. That is what I heard.

Q. Assuming that you were in charge of the train, such as Eddie Feehan was, under those conditions, as a conductor on the P & L branch, during the time that you say you operated, did you ever do what you have just described as sometimes done, at Arrow? A. Not at Arrow.

(Testimony of Merle C. Maury.)

Q. No; now will you read the following paragraph on page 44, the fourth paragraph? No, it is paragraph 3.

A. "Within yard limits second and inferior class, extra trains and engines must move at restricted speed."

Q. Within yard limits second and inferior class, extra trains and engines must move at restricted speed. What train was controlled—what Engineer was governed by that Rule on November 11, 1951, in connection with this accident?

A. Both Engineers on both trains.

Q. Did that rule govern and control Engineer Mely? A. Yes, sir.

Q. Have you had occasion to examine defendant's exhibit 22 for identification, you have looked it over, have you? A. No, I haven't.

Q. Will you step down here? A. Yes, sir.

Q. Take a look at that map because I want to ask you a few [152] questions. Is it not a fact that on that map is shown what might be called a warning sign, first, is there not a yard limit Board at this point I am pointing to? A. Yes, sir.

Q. Now, working back—further back, is there another sign which advises the Engineer that he is approaching the yard limit board?

A. Yes, sir.

Q. Where is that? A. Here (indicating).

Q. What is the purpose of the warning sign?

A. It is to tell the Engineer that the yard limit is ahead.

(Testimony of Merle C. Maury.)

Q. Under the rules, then, that were in effect on that date, the Engineer sees that warning sign, and knowing that there is a yard limit board further to the east, there is some duty devolved upon him, is there not? A. Yes, sir.

Q. What duty was there on that date on Engineer Mely? A. I would say to be alert.

Q. What else? A. How do you mean?

Q. You say to be alert, that is one thing—is that all; that means just to look and see, and be able to see what is going on? In addition to being alert what else was he called upon to do, if anything? Maybe I can refresh your recollection by repeating: "Within [153] yard limits second and inferior class, extra trains and engines must move at restricted speed"?

A. Oh, yes. Of course, that is up to his judgment.

Q. In other words, it is up to him to determine whether or not he is moving at restricted speed?

A. That's right.

Q. Kindly turn to, under the heading "definitions" in the rule book on page 8?

A. Yes, I have it.

Q. Do you see a heading there, "restricted speed"? A. Yes, sir.

Q. Will you kindly read that to the Court and jury?

A. "Proceed prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced."

(Testimony of Merle C. Maury.)

Q. "Proceed prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced." That rule controlled Engineer Mely on that date, did it not?

A. I would say so; yes.

Q. And if it was necessary to reduce that speed to ten miles an hour, under that rule, he was required to do it, was he not? A. Yes, sir.

Q. In other words, under that rule, is it not a fact that it was Engineer Mely's duty to have that train [154] under such control that when he applied the brakes he could stop short of the rear end of the caboose into which his Engine crashed—that was his duty, wasn't it? A. Yes.

Q. In other words, is it not a fact that the warning Board is an extra caution to him? When he hits that sign it warns that at a further distance east is the yard limit board, then he should begin to get his train under absolute control, shouldn't he, before entering the yard limits?

A. Yes, sir; I would say so.

Q. You have referred to rule 99, and his Honor has read it and it has been read; now, isn't it a fact, Mr. Maury, that that rule refers to train operation outside of the yard limits?

A. That isn't what it says in the book, Mr. McKevitt.

Mr. McKevitt: Will you read the question, Mr. Reporter?

(Question read by reporter.)

(Testimony of Merle C. Maury.)

Q. Now, that can be answered "yes" or "no."

A. No, it doesn't. I never realized I answered like that.

Q. Is it your testimony that that rule refers to trains within the yard limits and also without the yard limits?

A. Under certain circumstances, yes, sir.

Q. Circumstances that are referred to there where the [155] language is used, "When a train stops under circumstances in which it may be overtaken by another train," means this, does it not—you are familiar with the fact that when you leave this bridge there is an area in here where there is no yard limit, is that right? A. Yes.

Q. The circumstances that are referred to in that rule are these: That if Eddie Feehan's train for some reason or other had stalled in this area outside of yard limits—those are the circumstances that would require him to go back and protect against 6015, that's true, isn't it?

A. Yes. What I meant, Mr. McKevitt, it doesn't refer to yard limits in Rule 99.

Q. That's exactly what I am talking about. Rule 99 does not refer to yard limits, does it?

A. It just says any place.

Q. What I am asking you, you have one rule that is a yard limit rule, don't you?

A. Yes, sir.

Q. That is 93? A. Yes.

Q. Then you have 99? A. Yes, sir.

Q. You know, Mr. Maury, that 99 doesn't refer

(Testimony of Merle C. Maury.)

to yard limits because you have a separate yard limit rule; you [156] know that, don't you?

A. Yes, sir.

Q. Isn't it a further fact that rule 99 only requires you to flag against first class trains within yard limits? A. That's right, sir.

Q. And 6015 and 1648 were not first class trains, we are agreed on that? A. That's right.

Q. Isn't the fact within your information that extra train 1648 east was known as the Stites Local, you knew that? A. Yes, sir.

Q. And was an assigned run, to your knowledge, that left East Lewiston on Sundays, isn't that correct? A. It wasn't to my knowledge.

Q. I see—in other words, you had no knowledge one way or another on that subject, you don't know. Is that true? A. That is correct.

Q. What schedule it operated on, that is, 1648, you do not know? A. No, I didn't.

Q. You read to the Court and jury rule 108 on page 55, "In case of doubt or uncertainty, the safe course must be taken." That refers to the condition set out in 107. Read 107, just ahead of that. [157]

A. "Trains or engines must run at restricted speed in passing a train receiving or discharging traffic at a station, except where proper safeguards are provided, or the movement is otherwise protected. They must not pass between it and the platform at which traffic is being received or discharged, unless the movement is properly protected."

Q. Now, rule 108, "In case of doubt or uncer-

(Testimony of Merle C. Maury.)

tainty, the safe course must be taken," refers to rule 107, does it not?

A. No, sir; I wouldn't say it did.

Q. What does it refer to? Does it refer to all the rules in the book? A. Yes, sir.

Q. Well, now, in case of doubt or uncertainty, as that language is used, as used in that rule, under the circumstances as you know them to have existed on that date, what doubt, or what uncertainty could have been in Eddie Feehan's mind?

A. Well, he knew there was cars on the siding; that he would be obstructed; that he had a bank on the other side, and he knew probably, working on the Camas Prairie, that 662 would be running extra, and it might not know anything about him being there, under the circumstances that is what I would say.

Q. In other words, you say that Eddie Feehan very likely knew or should have known that 662, which went down to Lewiston as a scheduled train, would not be 662 [158] leaving Lewiston but would be extra 6015?

A. I imagine Eddie knew. It was the common practice out there, on Sundays was the time to run them extra.

Q. You imagine Eddie knew that?

A. Yes, sir.

Q. That he knew 6015 would be coming along there? A. Yes, sir.

Q. Do you think Eddie knew or would be presumed to know what time extra 6015 was called?

(Testimony of Merle C. Maury.)

A. Yes, sir.

Q. It wouldn't be on any order book?

A. No, it wouldn't be on any order book. He has a phone——

Q. At Lewiston?

A. No; at Arrow, he could have found out, and he could have found out at North Lapwai.

Q. Have you ever done that, running as a conductor on an extra, on that line?

A. Not on that line; I have on the main line.

Q. I am not talking about the main line—you have never done it on this line, have you?

A. Let's see——

Q. Your answer is no?

A. I can't remember whether I have or not.

Q. If you will examine this map—you will notice the yard limit board is here?

A. Yes, sir. [159]

Q. Now, one question further, assuming that the yard limit Board was 4319 feet from the point of collision, is it your opinion in this case that when Engineer Mely passed that yard limit board, that he was proceeding at restricted speed?

A. Maybe not, and maybe yes.

Q. That is the best answer you can give?

A. All I can say is that I wasn't the Engineer, I wasn't there, I wasn't even on the train.

Q. You are testifying as an expert; are you able to express an opinion as to whether he was traveling at restricted speed when he passed that yard limit board?

(Testimony of Merle C. Maury.)

Mr. Shone: We object to that as incompetent, irrelevant and immaterial and it calls for a conclusion of this witness. It is entirely without the knowledge of the witness even if he is an expert.

The Court: I don't see how he could possibly answer——

Mr. McKevitt: Now, if the Court please——

The Court: Go ahead; I am not going to argue with you about this; he may answer, if he can, but he has said that he doesn't know anything about the speed and I guess the presumption is that he was driving properly. Go ahead, he may answer.

A. I am afraid that I am not qualified to give an opinion on how fast he was going; if it had been my own train [160] I might have an opinion.

Q. Very well, do you wish to testify in this case as a thoroughly disinterested witness?

A. Yes, sir; absolutely.

Q. Isn't it a fact at the present time you have pending in the District Court in Silver Bow County, Butte, Montana, an action against the Northern Pacific Railway Company in which action Mr. Shone is your attorney and in action you are suing the Northern Pacific Railway Company for $125,000.00 for injuries you claim you received while in its employ? A. That's right.

Mr. McKevitt: That's all.

Redirect Examination

By Mr. Shone:

Q. Mr. Maury, in regard to the last question asked by counsel——

(Testimony of Merle C. Maury.)

The Court: I hope that you gentlemen are not going to start in and try some other case here.

Mr. McKevitt: This is for the purpose of——

The Court: Go ahead; it seems I waste more time than counsel when I try to hurry this along.

Q. How do the employees of a railroad seek compensation if they are injured?

Mr. McKevitt: That is objected to as [161] incompetent, irrelevant and immaterial.

The Court: He may answer.

Q. If you know.

A. Well, unless you accept what the claim department of the railroad Company gives you the only recourse you have is under the Federal Liability Act, which means only that the course open to you is to go to Court.

Q. You are not under the Compensation Act?

A. No, sir.

Q. And you must ask the Judge and Jury to decide how much you are entitled to?

A. That's right.

Q. And Congress has passed that law?

A. That's right.

Q. Now, Mr. Maury, can you tell in miles per minute, what is meant by reduced speed, in miles per minute?

A. Yes; if you reduce five miles an hour you are reducing speed and if you reduce fifty miles an hour you are reducing speed.

Q. Now, as to a restricted speed, is there any

(Testimony of Merle C. Maury.)

maximum speed limit within the yard on this railroad line? A. No.

Q. On November 11, 1951? A. No.

Q. Is there anything in the rules that defines restricted speed at a maximum number of miles per minute? [162] A. No, sir.

Q. Now, restricted speed or reduced speed, as I understand your testimony, is the judgment of the engineer? A. That's right.

Q. In operating the train?

A. That's right.

Q. In other words, he must get his train over the road? A. That's right.

Q. Now, when you said rule 99 applies under the facts which I gave you, you were taking into consideration the obstructions—the facts which I framed in that question as being true, were you?

A. Yes, sir.

Q. And where the train or the car, whatever it might be, on the track, then you claim that rule 99 would apply? A. Yes, sir.

Q. Now, as this train 1648 left Lapwai and came to the yards at Arrow, if they found that obstruction by those boxcars on the south siding, what would the Engineer or Conductor have done, or what should he have done, or they, or any member of the crew?

Mr. McKevitt: We object to this as incompetent, irrelevant and immaterial and not proper redirect examination.

(Testimony of Merle C. Maury.)

The Court: I think he has covered this fully, but he may answer again. [163]

A. As I said, what I would do, I would immediately put out my torpedoes and check my train, a little anyway.

Mr. McKevitt: We move that the answer be stricken and the jury be instructed to disregard it, as not being within the issues here.

The Court: He has already testified to this in reply to other questions. I will strike it on the ground that it has been answered heretofore.

Q. Now, as to rule 93, which counsel asked you about within the yard limits, "Within yard limits the main track may be used without protecting if the train was obscured from view of an oncoming train." Would that rule apply or would rule 99 apply, in your opinion?

Mr. McKevitt: Objected to as not proper redirect examination; the rule speaks for itself, and this witness has no right to interpret the rule unless there is ambiguity in it.

The Court: I think he has answered it clearly before; if he hasn't, I will let him answer it. Do you know the question, Mr. Witness?

A. No, I don't.

(Question read by reporter.)

A. In the interest of safety, I would say that rule 99 applied.

Q. Referring you to Plaintiff's Exhibit 11, you

(Testimony of Merle C. Maury.)

are familiar with that curve which is west of the west curve? [164] A. Yes.

Q. Is that the sharp curve? A. Yes, sir.

Q. If a car was left just east of that curve, say 100 feet and that would be the last car of a string of cars, that is within yard limits, is it not?

A. Yes, sir.

Q. And would that be such a circumstance as would warrant putting out torpedoes, in your opinion?

Mr. McKevitt: That is objected to as incompetent, irrelevant and immaterial and is not subject to expert testimony. The rules are in evidence and speak for themselves.

The Court: He may answer.

A. Yes, sir; absolutely, I would.

Q. Would there be any doubt in your mind about it? A. No.

Q. You told the jury in regard to a question asked by Mr. McKevitt, regarding the putting down torpedoes, that you didn't do it at the station of Arrow, but that you did it at other places on this line?

A. On the main line, and on the C W Branch and the P & L Branch.

Q. While your train was in the station yard?

A. Oh, yes.

Q. You have put them down? [165]

A. Yes, sir.

Q. Now, the rule that Mr. McKevitt drew your attention to on page 6, as follows: "They must

(Testimony of Merle C. Maury.)

expect trains to run at any time, on any track, in either direction." Did that rule apply to train 1648 while it was at the Station at Arrow?

A. Yes, sir; it applies to any train.

Q. They could expect a train to run in either direction at any time? A. Yes, sir.

Q. And this being Sunday and them knowing that extra trains were put out on Sunday they could expect another following train to come into that station? A. Yes, sir.

Q. Mr. Maury, are you still an employee of the Northern Pacific Railway Company?

A. To my knowledge I am, yes.

Q. The fact that you bring a lawsuit does not mean that you are not an employee? A. No.

Q. It doesn't cancel your position?

A. No, sir.

Q. And regardless of the outcome of your lawsuit you still retain your rights and act as an employee? A. Yes, sir.

Mr. Shone: That's all.

Recross-Examination

By Mr. McKevitt: [166]

Q. I think I understood you to say in response to a question by Mr. Shone, about this lawsuit in Butte, that you either take what the claim department offers you or you have to sue?

A. That's right.

Q. I suppose that the Claims Department offered

(Testimony of Merle C. Maury.)

you a certain amount in this case and you said, "No, I am not entitled to that—I want $125,000.00"?

Mr. Shone: I object to that as incompetent, irrelevant and immaterial, and is an attempt on the part of counsel to prejudice the jury.

The Court: Yes—I don't want to try any other lawsuit here. I don't know anything about the merits or the demerits in any other case and he has stated that he had this suit and he said that is the only way he could recover unless he would make a settlement.

Mr. McKevitt: My thought was this, your Honor, I introduced this for the sole purpose of showing that this man is not a distinterested witness. Your Honor agreed with that, and then Mr. Shone went into the question of—if you get hurt by the Company you have to sue them, unless you settle with the Claim Department. I would have left it alone entirely if he hadn't opened the subject up [167] again.

The Court: I think I will stop now, and instruct the Jury to disregard any testimony that this witness gave from the witness stand in regard to this lawsuit that he has in Montana, except the fact that he does have a lawsuit against the Railroad Company.

Q. Now, Mr. Maury, am I correct in my recollection of your testimony that on November 11, 1951, you stated that there was no speed restriction in that area, the train Mr. Mely was operating, did

(Testimony of Merle C. Maury.)

you so testify? A. I don't remember; did I?

Q. Do you recall Mr. Shone asking you that question, if there was any maximum speed in that area?

A. What area do you mean? Do you mean the yard limits——

Q. On that whole line, for that type of train. Do you recall him asking you if there was any maximum speed prescribed, and wasn't it your testimony that there was not?

Mr. Shone: We object to the form of the question. I believe I asked him whether there was any particular speed limit under the rule of restricted speed, and also under the rule of reduced speed.

Mr. McKevitt: My recollection of the testimony is, and, of course, it is ultimately for the jury to determine who is correct, that he was asked the question in substance and he testified in effect, that on November 11, 1951, there was no maximum speed limit prescribed for train 6015. [168]

The Court: I will go just a little farther with you and say that I think that was within the yard limits. I may be wrong and we may have to go back and have the Court Reporter read that to us.

Mr. McKevitt: I don't want to trespass on the time of the Court but I want to have that issue cleared.

The Court: You go ahead and ask your question.

Q. Is it not a fact that on November 11, 1951, the maximum of a freight train such as 6015, under any conditions on that line, was thirty miles an

(Testimony of Merle C. Maury.)

hour, freight train? A. Yes, sir; I think so.

Q. Is it a fact, is it not?

A. Yes, sir; they have restrictions all up and down that branch.

Mr. Shone: We will agree on that.

Mr. McKevitt: If it agreed that there was a maximum speed, under any conditions, of thirty miles an hour on that line for that type of train we will not pursue it further, on that date, under any conditions.

Mr. McKevitt: No further cross-examination.

Mr. Shone: The Plaintiff now rests, your Honor.

The Court: I have a question of law to take up with counsel and I will excuse you ladies and gentlemen of the Jury until 10 o'clock tomorrow morning. [169]

MOTION FOR DIRECTED VERDICT

Mr. McKevitt: The Plaintiff having rested, the defendant now challenges the sufficiency of the evidence to sustain the material allegations of the complaint with reference to the alleged negligence of the Defendant Railway Company, and moves the Court to direct the jury to return a verdict in favor of the defendant and against the plaintiff. The allegations of negligence are specifically recited in paragraph five of the complaint and they are twelve in number.

1. "Failure to provide A. E. Mely a safe place to work." I know of no evidence here that would justify submitting that issue to the jury. Of course

we all know that is a catch-all phrase, there isn't a suit that Mr. Shone brings or anybody brings against the Railroad Company that they don't allege that.

2. "Failure to provide and supply safe and adequate equipment." That goes out under their own testimony.

3. "Running and operating Train Number 6015 on its line without a sufficient number of cars in it so equipped with power or train brakes that the Engineer on the Locomotive drawing such train could control its speed without requiring brakemen to use the common hand brake for that purpose." I don't think I need to belabor the Court with the proposition that there is no evidence on that [170] issue.

4. "Running and operating train number 6015 on its line without coupling the air hose." Mr. Shone admits that is out.

Mr. Shone: I will admit that you are right on 2, 3, and 4, so far.

5. "Running and operating train number 6015 on its line without connecting the air between engine No. 6015 and the cars following in said train." Do you agree that may go out?

Mr. Shone: I agree.

6. "Instructing engineers on its line to disregard Company rules while proceeding through its station yards." Do you agree that it out?

Mr. Shone: I submitted no instructions on any one of those.

7. "Compelling engineers on its line to proceed

according to time schedule, regardless of Company rules."

Mr. Shone: That's out.

8. "Allowing train number 6015"—excuse me, strike that—"Allowing train number 1648 to stop on a sharp, blind curve for switching purposes, well knowing the schedule and exact arrival of train number 6015 at the place where the collision occurred." There isn't a scintilla of evidence here to support the statement that Feehan, in charge of that train, knew the schedule of 6015. There is no schedule introduced in evidence and the evidence [171] of the plaintiff is that 6015 was a non-scheduled train.

9. "Failure to provide and equip its railroad system at the place of collision with a signal block system to warn plaintiff's decedent of the voluntary obstruction ahead, as herein alleged." Do you contend that we were negligent in not having block signals at that point and that it is a jury question?

Mr. Shone: It is a matter that the jury may take into consideration.

The Court: There is no use to make any argument here. Get your motion in the record.

10. "Failure to give A. E. Mely any warning of any kind whatsoever of the obstruction and danger ahead, as herein alleged." Under the rules introduced here and read into the record, that failure on the part of the Railroad Company could only have been the failure of Mr. Feehan to instruct his flagman or crew to go back and place torpedoes and signals and so forth. We claim that there is no evidence here that he was required to do that.

On the contrary, their evidence is to the effect that he was not required to do it.

11. "Failure to place men, flares or signals to give warning of said obstruction of said track a reasonable distance from said obstruction, so that A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision." [171-A] What was said with regard to number ten would be equally applicable to 11.

12. "Failing to properly protect train number 1648 while it was in such obscure position aforesaid, and in failing to properly protect train number 6015 from colliding therewith by notice, signal, warning, flares, orders, or any kind of notice sufficient to warn A. E. Mely of the obstruction of said main line track." That could only be bottomed on the proposition that there was a rule violation of the rules of this Company, and that rule violation could have only been on the part of Eddie Feehan and there is no evidence of any character, substantial or otherwise, to indicate that he violated his duty in that regard. With reference to the evidence allowed by the Court having to do with the question of whether or not there was a violation of the rules—rules 99, 101 and 108—we believe that the overwhelming weight of the evidence is to the effect that the rules did not apply to these trains in question and we feel the unfortunate tragedy that brought about the death of these three men was due to the failure of Engineer Mely to have his train under control and to operate it at a speed and under control so that when that caboose came into vision

so it could be stopped and that it was his negligence and his negligence alone. [172]

The Court: I will overrule the motion but the Court will withdraw certain of the counts, or allegations set forth in the complaint, from the consideration of the jury. I am of the opinion that 1, 10, 11 and 12 are the only matters to be submitted to the jury. Is there anything further?

Mr. McKevitt: I am finished with my motion.

Mr. Shone: Nothing further at this time.

The Court: We will recess until 10:00 a.m.

October 1, 1952—10:00 A.M.

The Court: The motion to strike, if there was a motion to strike, if not the Court will withdraw from the consideration of the jury the allegations as to the acts of negligence numbered 2, 3, 4, 5, 6, 7, 8, and 9. One, ten, eleven and twelve to remain.

Mr. Shone: May the record show that the pleadings were not read to the jury?

The Court: Yes.

(Opening statement by Mr. Clements.)

STIPULATION

The Court: I might suggest to counsel that it appears to me that this matter might be shortened a great deal by a stipulation. I think that it has already been stipulated or understood that Mr. Mely was a competent Engineer and that he was well qualified; that he understood the rules; that he had passed examinations on them and was well quali-

fied. I see no necessity [173] of proving anything in that regard as far as Engineer Mely is concerned, and then I don't see any necessity of taking up any time in proving that these rules were adopted by these different railroads for the protection of the Railroad Company, the public and the employees. I see no necessity of taking any time to do that. Those are two matters that I think can readily be stipulated.

Mr. Shone: May I suggest another matter or two?

The Court: Yes.

Mr. Shone: Also, your Honor, we will agree to all that your Honor has stated as being true, and also it should be stipulated that Brakeman Brown was familiar with these rules and had passed examinations, because he was up in front with the Engineer. Mr. Reisenbigler has already testified that Brakeman Brown was familiar with the rules and had passed examinations on them.

The Court: I think we can go still further and say that all the employees on both trains——

Mr. Clements: Including Conductor Feehan.

The Court: Yes; that they were all familiar with the rules. That may be stipulated.

Mr. McKevitt: May we stipulate as to the map being introduced?

Mr. Shone: Yes; that the map may be [174] introduced as being properly made.

The Court: And that the measurements thereon are correct in all respects.

Mr. Shone: And that the photographs they have

offered here may be admitted as being correctly made and truly showing what they, each, depict.

The Court: Very well. That may be stipulated.

Mr. Clements: This map is Exhibit 22.

The Court: And the record shows that it is admitted.

J. P. TITUS

called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. McKevitt:

Q. Will you state your name to the Court and Jury? A. J. P. Titus.

Q. How old are you? A. 35.

Q. Where do you reside?

A. Spokane, Washington.

Q. By whom are you employed?

A. The Northern Pacific Railway.

Q. How long have you been employed by that Company? A. Since 1940. [175]

Q. And your title?

A. Division Engineer of the Idaho Division and the Camas Prairie Railroad.

Q. Is the area here under discussion in your division? A. Yes, sir.

Q. Under your supervision? A. Yes, sir.

Q. You are familiar with it? A. Yes, sir.

Q. You have been over the track many times?

A. Yes, sir.

Q. In your official capacity? A. Yes, sir.

(Testimony of J. P. Titus.)

Q. Are you a graduate of a school of Engineering?

Mr. Shone: We will admit his qualifications.

Q. Mr. Titus, referring to Plaintiff's Exhibit 22, did you prepare that map? A. Yes, sir.

Q. What territory is embraced in that map?

A. The map starts at the east end of Bridge 126 near Arrow and continues through the yards and including Arrow Station—Arrow Depot and goes up on the Lewiston Branch of the Northern Pacific for approximately 1500 feet and on the Stites Branch of the Clearwater short line for approximately 1500 feet.

Q. Is that prepared to scale? [176]

A. Yes, sir; prepared to a scale of 1 inch to 100 feet.

Q. In other words, one inch on the map equals 100 feet on the ground? A. That's right.

Q. By the way, when we speak of east and west on the map what is the fact, are we referring to timetable directions or compass direction?

A. We are referring to timecard directions, which, however, are very close to compass directions. That is north (indicating) and this is east timecard direction.

Q. Beginning on the easterly end of the map, just point out to the jury if there exists a yard limit sign?

A. There is a yard limit sign exists here near mile post 125; engineering station on that is 6599 plus 62.4. I can explain that engineering station,

(Testimony of J. P. Titus.)

starting at Marshall, the beginning of the Palouse and Lewiston branch and every hundred feet is given a number, the first 100 feet away from Marshall is number 1.

Q. Marshall is just outside of Spokane?

A. Yes, Marshall is just outside of Spokane, and the Stations therefore run from east to west to Lewiston, the mile posts from east to west, this (indicating) is 124 and this 125 and 126.

Q. Now, you pointed out, did you, the first yard limit board?

A. This is the first yard limit board. [177]

Q. Is there any other sign east of that, that would advise the Engineer in charge of a train that he is approaching the yard limit?

A. Not east.

Q. West?

A. West, yes, the one mile warning board.

Q. Point to it on the map.

A. Here (indicating).

Q. What does that sign say?

A. Yard limit, one mile.

Q. To your knowledge was that sign there November 11, 1951?

A. To my knowledge—no, I don't know that it was there on November 11, but it was there on the 15th; when I made my survey.

Q. That was four days later? A. Yes, sir.

Q. Is that true of the yard limit board?

A. Yes, sir.

(Testimony of J. P. Titus.)

Q. Further east of the first yard limit sign are there other signs on the map?

A. East of the yard limit sign?

Q. Yes.

A. Well, there is a station, one mile sign.

Q. Where is that?

A. It is located right here (indicating).

Q. What is the distance from the yard limit board to the [178] Station sign?

A. About 2300 feet.

Q. I notice here, Mr. Titus, will you explain to the jury what this is (indicating)—explain what that line indicates.

A. That line is the vision limit line from this point. It refers to the limit that you can see to the left. I might add that to the right is the Clearwater River. There is no sight restriction to the right but here (indicating) there is a bluff; after we drew the map we drew the line and there is a bluff coming close to this line, and we can see here what would be visible from this point.

Q. Mr. Titus, assuming that there was a train on the main track on November 11, 1951, up there at the depot; that the Engine was opposite the depot, the train having 85 cars, I believe, with a caboose to the west, where would the Engineer of a train going west first have a vision of those cars on that track, where would his point of vision begin?

A. Well, he could probably see that——

Mr. Shone: We object to the form of the ques-

(Testimony of J. P. Titus.)

tion; the witness has already testified that mathematically he would have a vision—now, whether he would have an actual vision because of any obstructions, I don't believe that this witness can [179] testify.

Q. Are you able to testify as to the actual vision you would have of those cars standing on the track as indicated on that date?

A. On November 15 I actually stood on the track and I could see——

Q. You stood where?

A. I stood on the track here, right at that sign, this yard limit sign, and I could see the location of the track in this vicinity.

Q. Now, Mr. Titus, you say, "in this vicinity," where are you pointing to on the map?

A. In the vicinity of mile post 124 and the vicinity of where the accident occurred.

Q. Is the point of collision shown on that map?

A. Yes, sir.

Q. Point it out to the Court and jury.

A. Here (indicating).

Q. Assuming that the boxcar was standing where the point of collision is indicated on the map, do you know of your own knowledge what view the Engineer operating the Diesel unit would have? What view he would have of the boxcar, and when would it first come into his vision, how far west of the point of collision? A. Which boxcar?

Q. The caboose.

A. In reference to the fifteen cars on the siding

(Testimony of J. P. Titus.)

at the [180] time of the accident—the first point that caboose would come into view would be right here (indicating). This station is 6566 plus 23.6.

Q. What vision would he have, for what distance? A. 980.3 feet.

Q. 980.3 feet? A. Yes, sir.

Q. Then with reference to this Bluff, is there any indication as to the distance of some point near the bluff to the point of collision?

A. The bluff extends along quite a length of track—the east end of the bluff is at Station 6567 plus 30, at that point.

Q. How far is the east end of the bluff from the point of collision, did you testify to that?

A. No; I didn't.

Q. Will you please do so?

A. 1080 feet approximately. I can give it to you exactly.

Q. No. How many tracks are there in the vicinity of Arrow; there is the main line and what else?

A. At the Depot there is the main line; the Palouse and Lewiston and the main line on the Stites branch and there is one siding directly opposite the depot and a second siding east of the depot.

Mr. McKevitt: No further questions at this time. You may cross-examine. [181]

Mr. Shone: May I examine from the map?

The Court: Yes, you may.

Mr. McKevitt: May I ask another question or

(Testimony of J. P. Titus.)

two? Mr. Clements called my attention to another matter. I am sorry, Mr. Shone.

Q. (By Mr. McKevitt): I notice, Mr. Titus, on this map at different points you make certain reference, for instance, here is "Picture number 6," then there is "Picture 5, picture 4, picture 3, picture 2 and picture 1." Will you explain to the Court and Jury what those designations have reference to?

A. Those designations were locations of pictures that were taken during the test run as requested by the Interstate Commerce Commission. My duties there and all I did was to tie in the spacing and the location of the flags that were set out by Mr. Love of the Interstate Commerce Commission.

Q. Do you know where the pictures were taken from? Where was the camera?

A. In most cases the camera was in the cab of the locomotive.

Q. Does the map show how many pictures were taken, was it six or seven? A. Seven.

The Court: Are those pictures marked? [182]

Mr. Clements: Yes, they are now, your Honor. They are marked 26-1 to 26-7.

The Court: They may be admitted under the stipulation.

Q. You are handed defendant's Exhibits 26-1 to 26-7, inclusive. Will you kindly examine those photographs? A. Yes, I have.

Q. Now, Mr. Titus, take picture 26-1. Tell us—I

(Testimony of J. P. Titus.)

believe you said before that the camera was in the cab of the locomotive?

A. Yes, sir; it was in this case.

Q. Where was the picture taken from? You can refresh your recollection from the data on the picture if it is accurate to your knowledge.

The Court: Don't read the data out loud. Just refresh your recollection from it.

A. Picture number 1 was taken from just west of the yard limit sign; the yard limit sign shows in the picture.

Q. Are there any cars shown in that picture?

A. Yes.

Q. Showing you Defendant's Exhibit 26-2, you may refresh your recollection from the data there, do not read it out loud and then I will ask you a question. Is that Picture Tied in With the Map?

A. Yes, sir. [183]

A. This picture 2 is shown on the map taken from that location right there (indicating) which is station 6583 plus 01.6.

Q. Do you know what date this picture was taken?

A. This was on November 15, 1951.

Q. Are there any cars shown in that picture?

A. Yes.

Q. Where are those cars?

A. Those cars you can see from this location. I would rather not testify to that. I am not positive in my mind.

Q. Showing you Defendant's Exhibit 26-3, re-

(Testimony of J. P. Titus.)

fresh your recollection from that data. Is that picture shown on the map? A. Yes, sir.

Q. Point it out.

A. This picture was taken from the location shown as picture three, near the "station one mile sign," from the cab of the locomotive, the "station one mile sign" is shown in the picture.

Q. That picture, does it disclose any cars?

A. Yes, sir.

Q. Where are those cars standing?

A. This shows two groups of cars. It shows the 15 cars that was standing here (indicating) and another group of cars in this section, I am not sure of the number [184] of cars.

Q. Showing you Defendant's Exhibit 26-4, is that picture shown on the map? A. Yes, sir.

Q. Point out where 26-4 on the map is.

A. It is where picture number 4 is shown on the map, taken from the cab of the locomotive.

Q. What does it show?

A. Fifteen cars on this siding and it shows the corner—I think they call it the clearance flag on the caboose. You can see the corner of the caboose as placed in the test run.

Q. Where was the caboose standing?

A. The caboose was standing on the main line.

Q. When the test run was made?

A. When the picture was made.

Q. What is the distance from the point where the picture was taken to the caboose?

A. The distance at that point is 980.3 feet.

(Testimony of J. P. Titus.)

Q. Now, showing you Defendant's Exhibit 26-5, examine that, please. Where is that shown on the map?

A. That picture is on the map at location titled picture number five. That is taken from the cab of the locomotive and it was at the point at which the entire back face of the caboose was visible.

Q. What is the distance from where that picture was taken to the rear end of the caboose? [185]

A. 848.8 feet.

Q. Showing you Defendant's Exhibit 26-6, examine that, please. Now, is that shown on the map?

A. Yes, sir; that picture is shown on the map at location of picture 6. It was looking west from directly opposite the point that the caboose was set in the test run showing the test locomotive standing on the track.

Q. When the test run was actually made, however, was the caboose on the main line of the side track?

A. The caboose was on the side track when the test run was made.

Q. Why was the position changed?

A. Well, to avoid a second accident in case they couldn't get stopped in the distance they needed—they didn't want another accident.

Q. Now, the last one, 26-7, is that picture shown on the map?

A. Yes, it is shown on the location of picture number 7, which is taken from the side of the test

(Testimony of J. P. Titus.)

run Diesel locomotive showing the caboose setting on the siding. It was during the test run.

Q. Does that disclose the point where the Diesel in the test run stopped after the Engineer brought it to a stop? Does it show the caboose in front of the locomotive?

A. I can testify that is the point where the Interstate [186] Commerce Commission——

The Court: No, Mr. Witness, just leave the Interstate Commerce Commission out of this.

Q. Where is the front end of the engine so far as that picture is concerned?

A. Where it says picture 7 and the station is 6558 plus 82.1.

Q. And how far was that from the tail end of the caboose? A. 249 feet.

Judge Hiatt: Is that 249 feet from the Diesel to the caboose, as that picture shows?

Mr. McKevitt: That is the distance from the front end of the Diesel as used in the test run, after it came to a stop, the distance from the front end of the engine to the read end of the caboose.

Mr. McKevitt: You may cross-examine.

Cross-Examination

By Mr. Shone:

Q. Mr. Titus, will you give us the exact distance from the station house at North Lapwai to the station house at Arrow station?

A. May I refer to my notes?

Q. Yes, oh, yes, refer to your notes.

(Testimony of J. P. Titus.)

A. There is no station house at North Lapwai, there is a station sign. The distance from North Lapwai to the west end of the station at Arrow is 21,103.4 feet.

Q. That's just a little under four miles? [187]

A. Yes, sir.

Q. About 3.9 miles or something like that?

A. Yes, sir.

Q. There is 5280 feet to a mile?

A. That is correct.

Q. And how far from the station house was the caboose? A. At Arrow?

Q. Yes—to the caboose that was on the main line? A. 4800 feet.

Q. Now, will you tell us how many miles was travelled from North Lapwai to the point where the caboose was standing?

A. I can't tell you.

Q. You could deduct 4800 from the 21,103, couldn't you?

A. I could tell you the distance from the station sign at North Lapwai to the caboose.

Q. That's right, to where the caboose was. Give it in miles and fractions? A. 3.1 miles.

Q. Three and one-tenth miles?

A. Three and one-tenth miles from the sign at North Lapwai to the point of the caboose.

Q. Now, measure on the map and tell us the distance from the west switch west to the beginning of the first curve? A. About 42 feet. [188]

Q. In order to make that plain—going east as

(Testimony of J. P. Titus.)

this train was, when they came out of the last curve, completely out, the first unit of the Diesel, it was then 42 feet from the west switch?

A. That's right.

Q. And how far was it from the rear end of the caboose standing on the main line?

A. To the switch?

Q. Yes, and we have agreed that the caboose was 604 feet east of that switch. Does that measure out on the map? A. Yes, sir; very good.

Q. And what is that now?

A. It measures 603 feet. I would like to add here——

Q. Just a moment now—does the addition you are going to add have something to do with answering my question as to the number of feet from the caboose west to where that curve begins?

A. No, sir; it has nothing to do with the actual distance.

Q. And the actual distance is 603 feet?

A. Yes.

Q. Tell the jury what these little markings are on this map, these separate markings?

A. That is the fifteen cars on the siding.

Q. That siding is on the south side of the main line? A. That's right.

Q. And they are marked in little rectangles, are they not? [189] A. Yes, sir.

Q. To represent the boxcars? A. Yes, sir.

Q. Now, how far west on your map was the end of this west boxcar from the end of the caboose on

(Testimony of J. P. Titus.)

the main line? A. Approximately 350 feet.

Q. Now, in those photographs that we have just shown the jury, in any one of these photographs, or in all of them where cars are shown in the photographs, those cars were boxcars on the south siding, either the fifteen which we have just mentioned or some others on the siding south of the main line, further east? A. That's right.

Q. You have not attempted to explain to the jury that from any distance west, where these pictures were taken, you could see any hauling cars behind these boxcars? A. No, sir.

Q. That was hidden behind them?

A. No, sir.

Q. The cars that you see in these pictures are the cars in the siding, the day before, November 11, 1951? A. That's right.

The Court: We will take a recess at this time for 15 minutes. [190]

October 1, 1952—11:20 A.M.

Mr. Shone: Is it agreed here that this accident occurred at 11:10 a.m.?

Mr. McKevitt: That's right. And may we further agree that 6015 left North Lapwai at 11:04?

Mr. Shone: That is agreed.

Q. Are you familiar with the timetable?

A. It is not my job to be familiar with the timetable.

Q. Now, as an Engineer you know that a train travelling 30 miles an hour will make 44 feet per

(Testimony of J. P. Titus.)

second of time? A. That is right.

Q. And if it was going 60 miles an hour it would travel 88 feet per second of time?

A. That is correct.

Q. There is no dispute on that?

A. No, sir.

Q. And if Engineer Mely left North Lapwai at 11:04 he had 6 minutes in which to make the station at Arrow?

Mr. McKevitt: May I object to that as not proper cross-examination. I did not go into that on direct examination.

Q. Do you know or don't you know?

Mr. Shone: That may be improper cross-examination, your Honor.

The Court: I think it is.

Mr. Shone: I will withdraw the question. [191]

Q. Were you there when the test run was made?

A. I was there at the very completion of the test run.

Q. Did you have anything to do with the test run? A. No, sir.

Q. Nothing at all? A. Nothing at all.

Q. And you had nothing to do with the placing of the Diesel where it was going to start to make the test run? A. No, sir.

Mr. Shone: That is all.

Mr. McKevitt: That is all.

KENNETH A. BOX

called as a witness for the Defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. McKevitt:

Q. State your full name.

A. Kenneth Arthur Box.

Q. How old are you? A. 44.

Q. Where do you reside?

A. Tacoma, Washington.

Q. Prior to going to Tacoma, where did you reside? A. Spokane, Washington.

Q. By whom are you employed? [192]

A. By the Northern Pacific Railway Company.

Q. How long have you been employed by that Company? A. 18 years.

Q. In what capacity are you employed at the present time? A. Train Master.

Q. In what capacity were you employed on November 11, 1951? A. Train Master.

Q. In what Division?

A. Idaho Division.

Q. That includes the P & L branch?

A. Yes, it does.

Q. What are the duties of a train master?

A. Supervising the train movements, station employees, and all duties that the superintendent of the division delegates to you.

Q. Did you know Engineer Mely?

A. Yes, I knew Mr. Mely.

Q. Did you know the other members of the crew of 6015? A. Yes, I knew them all.

(Testimony of Kenneth A. Box.)

Q. Did you know the members of the crew of 1648? A. Yes, sir.

Q. Did you know the crew members of 1648?

A. Yes, I knew them.

Q. Under whose supervision, on that date, were the crew members of 6015?

A. Under my supervision. [193]

Q. Directly? A. Yes, sir.

Q. Mr. Box, are you familiar with the Consolidated Code of Operating Rules and General Instructions that controlled train movements on the P & L branch on November 11, 1951?

A. I am.

Q. Are you particularly familiar with what is known as rule 93? A. I am.

Q. Are you particularly familiar with what is known as rule 99? A. I am.

Q. Do you know what kind of a train 1648 was?

A. Yes, sir.

Q. By the way, did you go down to the scene of the accident? A. Yes, sir.

Q. Where were you when it happened?

A. In my home in Spokane.

Q. Within what time did you arrive at the scene of the accident?

A. Probably three hours later—three hours and a half later.

Q. Did you arrive by automobile?

A. Yes, sir.

Q. Did anyone go with you?

A. Mr. Murphy and Mr. Smith. [194]

(Testimony of Kenneth A. Box.)

Q. Who is Mr. Murphy?

A. Mr. Murphy is Master Mechanic for Northern Pacific at Parkwater and Mr. Smith is Road Foreman for Northern Pacific at Parkwater.

Q. Road foreman of what? A. Engines.

Q. Are you able to tell us whether this collision occurred within or without yard limits?

A. It occurred within yard limits.

Q. Are you familiar with the class of train 1648? A. It was an extra train.

Q. And was 6015 an extra train?

A. It was an extra train, yes.

Q. Now, within yard limits, how may the main track be used with respect to extra trains?

A. You may use the main track within yard limits, not protecting against extra trains.

Q. Without protecting?

A. Yes, without protecting.

Q. Have you an opinion, based upon your knowledge of these rules, and your experience as a railroad man, as to whether or not rule 99—just answer this yes or no—had any application to Conductor Feehan's train? A. Yes.

Q. What is that opinion?

A. It has no application to the case in [195] question.

Q. What does it apply to?

A. It applies to trains—the movement of trains outside the yard limits.

Q. Now, on November 15, 1951, were you at the vicinity of Arrow? A. Yes, sir.

(Testimony of Kenneth A. Box.)

Q. Was there a test run made that day?

A. Yes, there was.

Q. Did you take part in that test run?

A. I did.

Q. What equipment was used to make that test run?

A. A Diesel Electric Engine, the same class that was involved in the collision at Arrow on November 11, and 15 loaded cars—boxcars, the same number of cars that was in the train on November 11?

Q. Was a caboose used?

A. We had no caboose on this string.

Q. Was the Diesel that was used in that test run identical in every way with 6015?

A. The same class engine, bought at the same time.

Q. What was the purpose of making that test run?

A. To determine visibility and braking distances.

Q. And just tell the Court and jury how that test run was set up.

A. On November 15th, we had 15 loaded cars placed on the west end of the passing track at Arrow, which was in the same position that the fifteen cars were in on [196] November 11. We had a work train at Arrow handling a wrecker, finishing cleaning up the wreckage. We had this work train spot its caboose on the main line in exactly the same spot that Mr. Feehan's caboose was on, on November 11th. They were identical cabooses, both Union Pa-

(Testimony of Kenneth A. Box.)

cific cabooses painted bright yellow. We took this Diesel locomotive—the same class—we had Mr. Walters, Mechanical Superintendent of the Camas Prairie, and Mr. Love, Mr. Croon, myself, Mr. Turner, Engineer on the Camas Prairie, and Mr. Terry, Fireman on the Camas Prairie, and Mr. Al Munson, commercial photographer, from Lewiston, Idaho, all in the cab of the engine——

Q. Let me stop you there; how many in that cab—let's see—you had six——

A. There were eight.

Q. Was there room in the cab for all of you?

A. Oh, yes.

Q. No, go on.

A. On leaving Lewiston, we proceeded eastbound, that would be our timecard direction toward Spokane, to Lapwai and on through North Lapwai; on crossing the Clearwater bridge we started to looking for the first point where we could see the passing track at Arrow Station with these fifteen cars——

Mr. Shone: Now, if you will pardon me, if you are going into the effect of this test run, [197] and I assume you are—of what the test run was, we are objecting to any testimony of any test run being given by this witness, on the ground that no proper foundation has been laid for the introduction of any test run, or any such testimony, and before going any further I would ask permission of the Court to cross-examine this witness if he is about to tell what this test run amounted to.

(Testimony of Kenneth A. Box.)

The Court: You may cross-examine him.

Mr. McKevitt: Now, your Honor?

The Court: Right now, yes.

Cross-Examination

By Mr. Shone:

Q. Mr. Box, you said that on this test run you had fifteen loaded cars? A. Yes, sir.

Q. What were they loaded with?

A. Lumber.

Q. The fifteen loaded cars that Mr. Mely was hauling, what were they loaded with?

A. So near as I recall, most of the cars were lumber, there could have been one or two cars of wheat on the train.

Q. What do you mean, "so far as you recall"?

A. So far as I know now. I did know at the time because I got the way bills.

Q. You had the way bills? [198]

A. Yes, sir.

Q. You say that they were the same type of cars —how do you know that?

A. They were all boxcars in Mr. Mely's train and they were all boxcars in the train we handled.

Q. Was the lumber that was placed in these cars the same type of lumber or the same kind of lumber that Mr. Mely was hauling? A. I don't know.

Q. Do you know the weights of the cars with lumber in them, that he was hauling?

A. I know the weight of the entire train that he was hauling but not the individual cars.

(Testimony of Kenneth A. Box.)

Q. Do you know the weight of the train that you were in the test run?

A. It was estimated weight.

Q. Do you know the weight? A. No.

Q. This estimated weight was just somebody's opinion of what it was, is that right?

A. That is correct.

Q. You had the correct weight of Mr. Mely's train as a whole?

A. The way-bill weights.

Q. But you knew the weight of the cars, did you not? A. That's right.

Q. And you knew the weight of the Diesel [199] units? A. Yes.

Q. But on the test train, on this test run you didn't know the weight of the whole train nor of the individual cars as loaded?

A. Those cars had——

Q. Answer my question whether you knew it or not? A. No, I didn't know it.

Q. And in the run that Mr. Mely was making he did carry a caboose? A. That is correct.

Q. And you didn't have any caboose on this test run of yours? A. That is correct.

Q. Do you know the weight of the caboose?

A. I know what cabooses weigh yes.

Q. What do they weigh?

A. 18 and 22 tons.

Q. 18 tons. A. 18 and 22 tons.

(Testimony of Kenneth A. Box.)

Q. Now the Diesel unit—you say that it was the same kind of Diesel unit Mr. Mely was operating—was it of the same weight?

A. Insofar as I know it is of the same weight?

Q. Do you know if it is the same weight or not?

A. No, I don't know.

Q. Do you know whether or not the Diesel units in this test run had the same amount of mileage in each unit as [200] Mr. Mely's Diesel had?

A. No, sir.

Q. You don't know that? A. No, sir.

Mr. Shone: Now we will repeat our objection that there is no proper foundation laid for a test run, and this witness has clearly shown that no proper foundation is laid and he is not competent to testify to a test run made under similar circumstances as existed at the time Mr. Mely had this collision.

The Court: The objection will be sustained.

Direct Examination
(Continued)

By Mr. McKevitt:

Q. You used the word "estimated" in referring to the test run, what do you mean by that?

A. All cars have an estimated weight until they go through a terminal where they are weighed and then they are actually put over the scales and weighed.

Q. Under that definition then, what was the estimated weight of the test run train?

(Testimony of Kenneth A. Box.)

Mr. Shone: We object to the estimated weight, your Honor, unless it was put over a terminal and weighed, not only of the cars but of the load that that the train contained so as to equal the load that Mr. Mely had on the train behind him.

The Court: The objection will be sustained. [201]

Q. How is the weight of the test train estimated?

A. We had the way-bill weights, those cars came off the Clearwater branch line.

Q. The cars in the test train?

A. That is correct. There is no chance to weigh them up there. They come in to Arrow and the cars moving east are taken into Spokane and weighed at Spokane, that gives the correct weight of the lading and the car—the car weight is stenciled on the car.

Q. Are you able to tell us whether the box cars in the test run were the same or similar to the box cars in the Mely train?

A. They were the same type of cars, the general run of cars and looked like about the same kind of train.

Q. You saw the Mely train on the day of the accident didn't you? A. That's correct.

Q. You referred to way-bills, did you see the way-bills on the Mely train? A. Yes, sir.

Q. Then you know the weight of the Mely train?

A. 971 tons.

Q. Within your knowledge, was the weight of the test run train substantially the weight of the Mely train?

(Testimony of Kenneth A. Box.)

Mr. Shone: We object to that as not a question for which a proper foundation was laid. [202] No foundation for this man's testimony supporting a test run—as to what the word substantial means—it is a relative term and a variation of many tons could exist. Further, this witness has already testified that there was no caboose on this particular train that made the test, and that the caboose weighed some 18 to 22 tons. I think it is common knowledge and the Court would take judicial knowledge or notice if you are going to make a test such as this the test should be made as a true test and particularly as to weight.

Mr. McKevitt: I will go into the question of weight, your Honor, with reference to the factors, if any with reference to braking distance.

Q. Can you advise us on that Mr. Box?

Mr. Shone: We further object on the ground that the witness has already testified that he did not weigh these cars after they were loaded.

The Court: The objection will be sustained.

Q. You stated that you had the weight of the Mely train—the cars on the Mely train as taken from the way-bills? A. That is correct.

Q. Now, do you know whether or not the 15 cars that were in the test train, I am speaking not of the loads, but the weight of the cars, did the cars themselves weigh the same as the cars in the Mely train? A. You mean empty cars?

Q. Yes? [203]

A. No, I couldn't say that they do.

(Testimony of Kenneth A. Box.)

Q. That they do or do not weigh the same?

A. I couldn't say they do or do not weigh the same, the cars vary.

Q. Is that information available in written form? Can we procure that so far as the test train is concerned? A. I think you can.

Mr. McKevitt: At this time I will have to withdraw the witness until the information is furnished. I was going to pursue the question.

Q. With reference to making the test run is it the weight of the train or is it the length of the train that is important?

Mr. Shone: We object to that as not proper examination of the witness. I think the Court has some information on that at this time in regard to this test run. I don't see where the weight of the cars would have any material effect on his testimony unless he could give us the weight of those cars loaded equaling the weight of the Mely train. Evidently the weight of the cars would be immaterial here because he has already testified that he had no caboose would would be 18 to 22 tons more in weight on the Mely train.

The Court: I will excuse this jury until 1:45. The jury may retire. [204]

(In the absence of the jury.)

The Court: I will state to counsel that it has always been my impression that an arrangement of this kind would be inadmissible as evidence. In other words, the staging of an occurrence that hap-

(Testimony of Kenneth A. Box.)

pened in the past, that such evidence, having been acted out, as this was done, would not appear to be admissible. Of course, the Plaintiff, and no representative of the Plaintiff being present at this test run, there would be no way of contradicting anything that was done of said, and no doubt this demonstration was made for the purpose of litigation, made for the purpose of obtaining evidence for some hearing or litigation pending, and I would like to hear your authorities for doing this.

Mr. McKevitt: I understand this is apart from Mr. Shone's objection.

The Court: Yes—you go about doing this, you go out and stage a matter of this kind in the absence of the interested parties who are litigants in this case and attempt to introduce it in evidence here.

Mr. McKevitt: I haven't any authorities at the present time.

The Court: I know there is a great deal of authority, both ways, on the question of putting a certain person in a certain place of position to see what he could see. I had a case—I don't [205] know whether you were in that case of not—where we had a car put on the track in the position that they claimed the car was on, on the track, and stationed another man up on the road to see whether he could see that car on the track, and if I remember, the weight of authority was that could not be done. There was some authority that it could be done. I am interested in seeing that this case is

(Testimony of Kenneth A. Box.)

properly presented and in the absence of the jury I will say that I am not very much in accord with staging a showing of this kind and then presenting it to the jury.

Mr. McKevitt: I do wish to disabuse your Honor as to any idea that this test run was conducted by the Northern Pacific Railway Company, anticipating any litigation—that is not the fact. We made that test run because we were instructed to make it, by a very high authority.

The Court: Yes, I understand, but it was made with the idea in mind that it would have to be presented to whoever instructed you to make it. Just as if the Court ordered you. I take it that you have some authority.

Mr. McKevitt: No, your Honor, to be perfectly frank with you, I assumed that such a showing was all right. I will say that I know now that I should have been prepared on the legal phase of this matter. [206]

(Argument of counsel.)

The Court: Mr. Clements stated that in his opinion this evidence would be admissible, that is, as to this test run, insofar as the visibility was concerned. That's already in evidence here in connection with the pictures as stated by Mr. Shone. I don't see how it would be too objectionable to permit this witness to testify as to what the vision was when they were making the test run, if it was limited to that.

(Testimony of Kenneth A. Box.)

Mr. Shone: I would have no objection to that.

The Court: That is all right, and if counsel wants to go ahead with this witness and offer testimony as to the visibility feature of this test I will permit that.

Mr. Shone: But not as to the stopping of the train.

The Court: No.

Mr. McKevitt: And if I am able to satisfy myself and in turn satisfy your Honor as to the other phase of it, I presume that I may do so later.

The Court: Yes, you may. We will recess until 1:45.

October 1, 1952, 1:45 P.M.

Q. Mr. Box, in addition to the duties of your office as a train master, do you have a [207] profession? A. Civil Engineer.

Q. I believe you stated that you were present—I will ask you, were you present when certain pictures were taken? A. Yes, sir.

Q. Could you, by taking certain pictures, in conjunction with this map, testify to distances between the front end of the Diesel and the rear end of the caboose and the other objects on the track? A. Yes, sir.

Mr. Shone: In order to save time, the Plaintiff is willing to admit that the testimony of the Engineer who was previously on the stand and testified as to where these pictures were taken and marked on the map—we will admit that that testimony is correct?

(Testimony of Kenneth A. Box.)

The Court: That might save some time.

Mr. McKevitt: That is satisfactory.

Q. Now, when you got down to the scene of the wreck, did you observe conditions generally there?

A. Yes, sir.

Q. Was there any portion of 6015 off the track?

A. The two head units were off the track.

Q. That would be the D and the C units?

A. The way it was operating then, it would be, yes.

Q. Do you have any knowledge with reference to the other train as to the number of cars that were derailed or demolished, or both?

A. The caboose and eight log flats were [208] demolished.

Q. That's on Feehan's train?

A. Yes, sir, on Mr. Feehan's train.

Q. Mr. Box, showing you defendant's exhibit 27 marked for identification—are you able to tell us what that instrument is?

A. That is the speedometer tape removed from diesel 6015 November 11, at 5 p.m.

Q. Where? A. At Arrow.

Q. Is there writing to that effect on the tape?

A. There is.

Q. In whose handwriting is that?

A. My handwriting.

Q. Is you signature on there?

A. My signature is on here.

Q. Are there signatures of any other individuals there?

(Testimony of Kenneth A. Box.)

A. J. A. Smith Road Foreman Northern Pacific Railway; E. E. Cash, Supervisor of Maintenance, Camas Prairie Railway; J. F. McManus, Assistant Supervisor of Maintenance Camas Prairie Railway; R. E. Murphy, Master Mechanic Northern Pacific Railway.

Q. Were these signatures put on there by these various individuals in your presence?

A. Yes, they were.

Q. Was your signature put on there in their presence? A. Yes, sir. [209]

Q. Was the signature of each man put on there in the presence of the others? A. Yes, sir.

Q. Where was that tape taken from, if you know?

A. That was removed from the speedometer of 6015 on November 11th, 1951, at 5 p.m. by Mr. R. E. Murphy, Master Mechanic.

Mr. McKevitt: That is all.

Cross-Examination

By Mr. Shone:

Q. Mr. Box, about what time did you arrive at the scene?

A. Approximately 4 p.m. we drove down from Spokane.

Q. Was there a work crew ahead of you, present on the ground? A. They hadn't arrived yet.

Q. Others were ahead of you?

A. None of the Northern Pacific men—the Camas Prairie men had gotten there.

(Testimony of Kenneth A. Box.)

Q. Did you ever work on that line?

A. Yes, sir.

Q. Did you ever work as an engineer, fireman or a crew man? A. No, sir.

Q. You just worked as train master?

A. Yes, sir.

Q. You have been over the road a great many times? A. I have.

Q. Now, this extra 6015 is that what you call a first [210] class train or a second class train?

A. It is an extra train.

Q. Is it classed as either a first class or second class? A. No, sir.

Q. Neither one? A. No, sir.

Q. Just known as an extra?

A. That is correct.

Q. Now, in approaching the yards—you have plaintiff's exhibit 11—in approaching the yard at Arrow and to the west of the west switch, which I assume you are familiar with, near where the collision occurred?

A. I am familiar with the switch, yes, sir.

Q. It is the switch west of the south siding?

A. You mean the switch at the west end of the siding.

Q. Yes, known as the west switch. A. Yes.

Q. You are familiar with that?

A. Yes, sir.

Q. Now, just west of what is known as the west switch is a curve with a high embankment, you are familiar with that curve?

(Testimony of Kenneth A. Box.)

A. There is a curve there.

Q. You have exhibit 11, which is a photograph—is that a photograph of that curve?

A. I wouldn't be able to say from this photograph. [211]

Q. You wouldn't be able to say from that?

A. There is nothing here to orient a man positively as to where it was taken.

Q. Now, passing to you exhibits—first, exhibit 26-3 are you familiar with that photograph?

A. Yes, sir.

Q. Have you seen it before? A. Yes, sir.

Q. Where?

A. It has been in our files since they were taken.

Q. Where do you keep your files?

A. We have our files in the Superintendent's office in Spokane and the General Manager's office in Seattle.

Q. Have you gone over the picture in Mr. McKevitt's office? A. Not in his office.

Q. Or in his room?

A. I have seen these pictures, I have seen the file.

Q. Have you seen them in Mr. McKevitt's room? A. Yes, sir.

Q. Here is Moscow? A. Yes, sir.

Q. And other members of the N P were present looking at those pictures?

A. I think there were others present, yes, sir.

Q. And in that picture the photographer was

(Testimony of Kenneth A. Box.)

directing the camera in an easterly direction toward that curve? [212]

A. That would be east, time-card direction, yes, sir.

Q. It was shot in the same direction as 6015 would be going on November 11, 1951?

A. That is correct.

Q. That curve, from the position where the camera man was sitting on the diesel engine—can you see around that curve?

A. No, there is a spot in there that you can't see the track.

Q. That you cannot see the track?

A. That is correct.

Q. That's within the yard limits of Arrow station? A. That is correct.

Q. Now, assuming that a crew, a railroad crew, had stopped a caboose just around that curve for some reason, good or bad—what would have been their duty if they knew or could reasonably appreciate that another train was following them, under the rules of the Company?

A. We are assuming this is inside yard limits.

Q. It is inside yard limits?

A. They have no obligation to go back and protect themselves inside yard limits.

Q. Now, what would an ordinary, reasonable, competent employee of the railroad do under the circumstances that I have given you?

Mr. McKevitt: I am going to object to that,

(Testimony of Kenneth A. Box.)

if your Honor please, it is based on something not in evidence. [213]

The Court: That would be a matter for the jury to determine.

Mr. Shone: That is right, I withdraw the question.

Q. Now then, you say that under the rules, there would be no obligation for the employee, for any flagman or any employee on that train with the caboose back around that curve, to go back and put two torpedoes on the rails to warn oncoming trains, or following trains?

Mr. McKevitt: We object to this as immaterial——

The Court: ——That would be a matter for the jury to determine under the evidence now before them.

Mr. Shone: That is all.

Mr. McKevitt: That's all.

Mr. Clements: At this time the defendant offers in evidence defendant's exhibit 25 which has been identified and I understand there will be no objection.

Mr. Shone: No objection.

The Court: It may be admitted. What is that?

Mr. Clements: It is time-table 94 which was referred to yesterday. Now, I have several photographs and they have been marked for identification—counsel for both sides—each of these, your Honor, has a notation of where the picture was taken and counsel for the plaintiff agree with us,

that I may read the notations into the record and I will then introduce the picture [214] and the notation is to be removed from the face of the picture.

The Court: That is agreeable with the Court. You may proceed.

Mr. Shone: Yes, it is agreeable with the plaintiff.

Mr. Clements: I now offer defendant's exhibit 13, bearing the notation "camera facing southwest from the highway.

Mr. Shone: No objection.

The Court: It may be admitted, the clerk will mark it and it may be handed to the jury.

Mr. Clements: Defendant's exhibit 14 is view number 2, with notation "camera facing southwest from pasture north of main track." Defendant's exhibit 15 view 3, "facing west from point north of main line." Defendant's exhibit 16, which is view 4, "camera on X-6015-E facing east on main track." Exhibit 17, view number 5 which is "camera between tracks facing eastward." Defendant's exhibit 18 which is view number 10 "camera on top of loads on passing tracks, shows rear end of logging flats standing on main track. Exhibit 19 view 11 "another view from top of 15 loads on passing." Defendant's exhibit 20 is view 13 "camera between tracks facing westward with main track to right in view." Defendant's exhibit 21 is view number 12, "camera north of main track showing [215] D unit."

The Court: They are all admitted and they may be handed to the jury.

F. A. GRANGER

recalled as a witness for the defendant, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. McKevitt:

Q. You are the same Mr. Granger who has already been on the stand and you have been sworn?

A. Yes, sir.

Q. Mr. Granger, how long have you been a conductor for the Northern Pacific?

A. Since 1917.

Q. Continuously? A. Yes, sir.

Q. Have you ever acted as passenger conductor?

A. No, sir.

Q. Always freight service? A. Yes, sir.

Q. Have you ever acted as conductor on the train that Eddie Feehan was conductor on on November 11, 1951? A. Yes, I have.

Q. Is that known as the Stites local?

A. Yes, sir.

Q. What is the fact as to whether or not during the period of time that you conductor you were periodically examined [216] on the rules?

A. Yes, sir.

Q. Those examinations were for the purpose of determining, first, your acquaintance with the rules, and if you had that acquaintance from time to time or had forgotten them, is that true?

A. Yes, sir, that is true.

Q. Are you familiar with rule 99?

(Testimony of F. A. Granger.)

A. Yes, sir.

Q. In your opinion did that rule control any action of Mr. Feehan on that date?

A. No, sir.

Q. Do you know what rule 99 applies to?

A. Yes, sir.

Q. What is it?

A. If you are delayed outside a yard limit board that you will immediately protect the rear end of your train.

Mr. McKevitt: You may inquire.

Cross-Examination

By Mr. Shone:

Q. Mr. Granger, when, as Feehan's train was stopped within the station yards, if it was obscured by the station from an engineer of an overtaking freight train or any train that would be coming into that station or after coming in, what would be his duty under rule 99?

A. He would not have to flag within yard limits.

Q. Would he have to put out torpedoes? [217]

A. No, sir.

Q. If he were in yard limits, on a curve and on a curve with a deep cut, embankments on both sides and his caboose was stopped inside that curve and inside that cut, and he knew or could expect a train following him, would he be obligated under the rules, to put out torpedoes to protect his train and the oncoming train? A. No, sir.

Q. He would not.

(Testimony of F. A. Granger.)

Q. Would you, as a conductor, if your caboose was obscured from the vision of an engineer of a following train, would you, as a conductor, order torpedoes put out? A. I would not.

Mr. Shone: That is all.

Redirect Examination

By Mr. McKevitt.

Q. You are speaking of within yard limits?

A. Yes, sir.

Mr. McKevitt: That's all.

R. E. MURPHY

called as a witness by the Defendant, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Clements:

Q. Mr. Murphy, where do you reside?

A. Spokane, Washington.

Q. How old are you Mr. Murphy? [218]

A. 61.

Q. What, if any, position do you hold with the Northern Pacific Railway Company?

A. Master Mechanic on the Idaho Division.

Q. How long have you been so employed?

A. As a Master Mechanic since April 1, 1949.

Q. How long have you been engaged in the railroad business? A. March 7, 1910.

Q. Just describe as briefly as you can the differ-

(Testimony of R. E. Murphy.)

ent kind of positions you have held with the railroad since the beginning of your railroad career?

A. I hired out as a fireman on the St. Paul Division on March 7, 1910; promoted to locomotive engineer November 7, 1917. In 1939 I was promoted to a road foreman on the Yellowstone Division and in 1942 I was transferred as a road foreman to the Fargo Division. In 1947 I was transferred from the Fargo Division to the Idaho Division at Spokane, and in 1947 I was promoted to a Master Mechanic.

Q. State briefly what the duties and responsibilities of a road foreman are?

A. The duties of a road foreman are to supervise the performance of the engine men and to see that they comply with the rules and instructions of the railroad and also they are responsible for the mechanical condition of the engine. [219]

Q. Briefly what is the duty and the responsibility of a master mechanic?

A. A master mechanic's duties are to know that the mechanical condition of all the engines operating on the Idaho Division is good, that all the engines are in good operating condition; also he has charge of the road foremen; the shops, roundhouses, stationary plants, car department and he is also responsible to see that the men comply with the rules and instructions of the railroad.

Mr. Clements: I will admit that this next question is somewhat leading but I think it will save time.

Q. I assume that you are acquainted with the

(Testimony of R. E. Murphy.)

structure of diesel electric locomotive similar to 6015, a subject in this action? A. Yes, sir.

Q. You were acquainted with this particular locomotive were you? A. Yes.

Q. Do you know what those four units weigh, in tons?

A. Each unit weighs 115 tons and the four units weigh 460 tons.

Q. If I misstate what the fact was as to 6015 on November 11, 1951, being equipped with speedometer equipment——

A. ——this 6015 on November 11, 1951, had a speedometer in each operating unit, that would be the A and the D unit. [220]

Q. When you say the A and D unit, you mean the driving ends of the unit? A. Yes.

Q. Now, are those speedometers connected up; with each other, when one functions does the other function?

A. Yes,—could I make an explanation on that?

The Court: Yes, you may.

Q. The speedometers are connected with the leading wheel of the A and D unit, whichever end it is being operated from.

Q. Now, that connection is what causes the speedometer to function and register the speed of the train? A. Yes, sir.

Q. Does the speedometer register the speed of the train in miles per hour? A. Yes, it does.

Q. And can you describe where that is situated and how it is within the Engineer's vision.

(Testimony of R. E. Murphy.)

A. As the engineer—and I might say that he sits in a seat similar to this, and it would be to his left just about the distance my hand is and it is at an angle facing him so that it is possible that he can see the speedometer without moving his head to take his line of vision away from the track ahead.

Q. Describe as near as you can from the position of the chair you are sitting in, where his throttle and his braking apparatus is? [221]

A. Now, I am about average height and I have measured it from where I would sit in the Engineer's seat. The throttle would be eighteen inches from his body and the brake valve is also about twenty inches.

Q. You say the brake valve, how is that controlled, is it controlled with a handle?

A. Yes, there is a handle there about eleven inches long.

Q. Is there just one handle for all of the braking equipment on 6015?

A. There are two handles, one is termed as the automatic brake valve, that applies the brakes on the engine and train both, and the small handle is what is known as the independent brake, that just applies the brakes on the engine.

Q. You can operate both those brakes from a sitting position, is that right? A. Yes.

Q. I hand you defendant's exhibit 27 marked for identification, will you please examine that and state whether or not your signature appears

(Testimony of R. E. Murphy.)

thereon? A. My signature is on this tape.

Q. Referring back to the speedometer that is on these trains is there any recording made of the speedometer while it is in action?

A. That is correct, these speedometers have a tape inside of a box that is locked. [222]

Q. And who has a key to the box?

A. Only the supervisors on the railroad; they have access to it to change tapes, and also the road foreman and master mechanic.

Q. Does the engineer or fireman or any member of the train crew have access to that tape?

A. No.

Q. What is done with that tape, if anything, at the end of each run?

A. This tape is taken off by the supervisor and he signs his name that he removed the tape and also the date and the engine number and the engineer that arrived on that particular train that this tape was removed from.

Q. Referring to exhibit 27 for identification, and you may examine the instrument,—when was the first time that you ever saw that tape.

A. The first time I saw this tape was at 5 p.m. at Arrow, Idaho, and this was taken off——

Q. What date? A. November 11.

Q. What year? A. 1951.

Q. Who took it off the train? A. I did.

Q. Who unlocked the box?

A. I did. [223]

Q. Has that tape been continuously in your possession since November 11, 1951?

(Testimony of R. E. Murphy.)

A. Yes, it has, outside of——

Q. ——Don't say where,—if it was in the possession of any other official you don't need to name him or who he was connected with.

The Court: There is no question but what this tape was taken from that train, is there?

Mr. Clements: Then I will proceed faster. We now offer in evidence Defendant's Exhibit 27.

Mr. Shone: We would like to examine him on the exhibit before it goes in, your Honor.

The Court: I will admit it because I think we would just be taking up more time. You may cross-examine him on it later.

Mr. Clements: I will let him cross-examine him on that, there is no need of both of us doing it. If he doesn't examine fully, I would like to have the privilege of going into it later.

The Court: You go ahead and finish your examination. It is not my intention to stop anyone from getting their case in, but it seems to me we are taking up too much time. You finish with your witness and turn him over for cross-examination.

Q. Mr. Murphy, does that tap show the speed of that train for eight or ten miles prior to the time that the [224] speedometer quit functioning?

A. Yes, it does.

Q. Can you tell from that tape approximately when that train left East Lewiston? A. Yes.

Q. Will you please refer to the tape and then state from your interpretation of the tape, what rate of speed that train travelled according to that

(Testimony of R. E. Murphy.)

tape from East Lewiston on up; the track up to and including the point of collision?

A. When he left East Lewiston, from zero in the first mile he accelerated up to a speed of 27 miles an hour, then dropped for a mile and a half possibly, he dropped to 25 miles an hour and then he dropped from 25 in the middle of the mile to about 12 miles an hour——

Q. ——How far was that?

A. A half mile in the next mile, and then the other half mile of that mile he accelerated up to a speed of 35 miles an hour and in the next mile he accelerated up to a speed of 40 miles an hour and about the next three and a half miles he travelled between 40 and 43 miles an hour and then the next two-thirds of a mile he dropped down to zero.

Q. Where does that get him now, in station names?

A. That is where he would make the stop at North Lapwai.

Q. Now, what does the speed show to and past Arrow Junction?

A. From the time that he started at zero at North Lapwai [225] he started at zero and accelerated to a speed of about 27 miles an hour, that would be in two-thirds of a mile and then he dropped down to 25 miles an hour in the next mile, then he accelerated from there to a speed of 47 miles an hour, then in about 1300 feet he dropped to zero.

(Testimony of R. E. Murphy.)

Q. 47 miles an hour was the highest rate of speed from North Lapwai on?

A. That is correct.

Q. Have you ever operated a diesel electric locomotive such as 6015? A. Yes.

Q. As an engineer?

A. As a road foreman of engines.

Q. Assuming that a diesel electric engine, identical in construction, capacity and mechanical fitness as 6051, was coupled to fifteen loaded box cars and a Union Pacific caboose with a total over-all train load of 1431 tons, and assuming that that said train was being operated on a track similar in construction and alignment as goes through the Arrow yard limit; assuming that track is of such a nature what when you pass the yard Board your vision is unobstructed to the track ahead for 4319 feet; further assuming that after you pass that yard board you make two curves of degrees from two to three per cent and being of such a nature as you go through one of these cuts that the engineer's view is temporarily obstructed [226] for 550 feet from the track clear around the curve; now, assuming that that train was operated at thirty miles an hour, what in your opinion,—or do you have an opinion as to the distance in which that train could be stopped, going at that speed, with an emergency application. Do you have such an opinion? A. Yes, I have.

Q. What is your opinion as to the distance within which that train could be stopped going at

(Testimony of R. E. Murphy.)

thirty miles an hour under the conditions I have outlined to you?

A. Between seven and eight hundred feet.

Q. That is an emergency application?

A. Yes.

Q. What is meant by a service application?

A. That is where the brakes are applied in making an ordinary stop.

Mr. Clements: I think that's all at this time.

Cross-Examination

By Mr. Shone:

Mr. Shone: If it please the Court,—I think all this handwriting should be eliminated, that has nothing to do with the tape. It was done after the tape was taken off.

The Court: Yes, I think so but I don't know how you are going to do it. Before it goes to [227] the jury we will figure out some way to eliminate it.

Mr. Clements: I have an idea if the Court would like to hear it.

The Court: All right.

Mr. Clements: I think the handwriting, itself, could, in the absence of the jury, be dictated into the record with the agreement that when the tape was introduced in evidence that it contained that endorsement.

Mr. Shone: That part has already gone into the record.

The Court: It doesn't make any difference, we will do something about it. It seems to me that this

(Testimony of R. E. Murphy.)

case has taken entirely too much time, and too wide a field, we are only interested in what happened at the time of the accident, we have taken this train from East Lewiston to North Lapwai and into the junction, and it seems to me the whole question is; what was the duty of the railroad company in stopping this train or giving some warning or having the train dispatcher advise them in regard to it and those things. All the other matters seem to me to be quite foreign to the question for this jury to decide. We are taking up a lot of time here. Maybe I am wrong and understand, I am letting you go ahead.

Mr. Shone: I will be very short with my cross-examination. [228]

Q. Mr. Murphy, the automatic valve and the independent valve, now, the independent valve just puts the brakes on the diesel units, is that right?

A. That is correct.

Q. And the automatic valve puts the brakes on what?

A. On the locomotive and the train, both.

Q. When the automatic valve is put on do the cylinders in all the cars respond at the same moment? A. No, I wouldn't say that——

Q. I am just asking, do they respond. In other words, when the automatic valve is put on to put it in emergency each car in the train goes into emergency, one at a time? A. That's correct.

Q. And the longer the train is the longer it takes to put the train into emergency?

(Testimony of R. E. Murphy.)

A. Yes, but that's only a matter of seconds.

Q. How many seconds?

A. For how many cars?

Q. Fifteen cars and a caboose?

A. Not more than three seconds.

Q. Then it always takes some time for an engineer to react and get into action when he comes upon an obstruction ahead? A. That's true.

Q. And the length of time it takes depends upon the individual, and how he reacts to a dangerous situation? [229] A. That's true.

Q. And that's common knowledge?

A. That's correct.

Q. Now, on the speedometer tape as introduced in evidence, that tape is made by a needle something similar to a barometer needle, is it not?

A. That's mechanically connected,—I don't quite understand your question.

Q. You have had a barometric reading, have you not, where a needle just draws a line on a sheet of paper? A. Yes.

Q. In the speedometer, when this recording is made, there is a needle in there that draws a line?

A. That is correct.

Q. What kind of needle is that, explain it to the jury briefly?

A. This is a pencil instead of needle, and this pencil is connected to a hand on the dial of the speedometer which the engineer sees so that the marking on the tape will correspond correctly with the reading on the dial that the engineer sees.

(Testimony of R. E. Murphy.)

Q. And if the unit went into a collision that pencil may jump in any direction during a smash-up? A. I wouldn't say that's correct.

Q. What would you say?

A. If this pencil jumped or was erratic it would mark it on the tape that it was erratic. I might give you an [230] explanation if you will accept it.

Q. That would be your interpretation. Have you interpreted these tapes quite often?

A. Yes, I check them quite often.

Q. How about the tape on the front unit, 6015 D?

A. I don't know, that unit speedometer was destroyed.

Q. How about the tape?

A. It evidently was destroyed?

A. No, because everything was destroyed from the collision and fire.

Q. Did you make any effort to recover the tape from that unit?

A. We looked to see but there was nothing there.

Q. You took it out of another unit, the A unit. The fourth one back? A. That is correct.

Q. You think a train going 30 miles per hour under the same conditions with the same load could be stopped in seven or eight hundred feet, in an emergency? A. Yes.

Q. And that stopping in seven or eight hundred feet, that would be where you actualy go into emergency, from that point to the point of stopping?

A. That's correct.

(Testimony of R. E. Murphy.)

Q. And that is not allowing any time for reaction by the engineer or the reaction of the air to the air brakes on the cars?

A. That is correct. [231]

Q. You say fifteen second,—strike that,—three seconds for the air in fifteen cars and an unknown time for the engineer to react. That is a matter of how quickly an engineer does react?

A. That is correct.

Mr. Shone: That's all.

Mr. Clements: That is all.

The Court: We will take a ten minute recess.

October 1, 1952, 2:50 P.M.

The Court: Mr. Clements you had a couple of questions to ask the witness.

Mr. Clements: Yes, your Honor.

Redirect Examination

By Mr. Clements:

Q. Referring to the end of that exhibit,—what is the significance, in so far as the functioning of this tape is concerned, of these numbers starting at zero, 10, 20, 30, 40, 50, 60 and 70 and upward on this tape?

A. That would be the miles per hour.

Q. Now, what is the significance of these horizontal lines?

A. They are one mile for each space, each line is one mile and they are calibrated on two miles to the inch.

(Testimony of R. E. Murphy.)

Q. Where the pencil shows the recording, as the pencil goes up from the bottom of the tape, does that indicate the increase of the speed of the locomotive? A. Yes.

Q. And as it comes down it indicates the deceleration of [232] the speed or the decrease in speed? A. That's right.

Mr. Clements: That is all.

Mr. Shone: That's all.

Mr. McKevitt: The Defendant rests, your Honor.

The Court. Do you have any rebuttal.

Mr. Shone: The Plaintiff rests, your Honor.

The Court: The Court will be recessed, so far as the jury is concerned, until 9:30 tomorrow morning. The jury may now retire.

(In the absence of the jury.)

MOTION FOR DIRECTED VERDICT

Mr. McKevitt: If the Court please,—the Plaintiff and the defendant having rested, the defendant now renews the motion for a directed verdict as made at the close of the Plaintiff's case, and now moves the Court to instruct the jury to return a verdict for the defendant and against the Plaintiff, for the reason and upon the grounds that it has now been disclosed from all the evidence that the sole and proximate cause of this accident was the failure of Engineer Mely to comply with the operating rules and instructions of this defendant company, particularly rule 93.

It now appears conclusively that this failure on the part of Engineer Mely was the sole and proximate cause of the accident; for the reason that there has not been shown that any duty owed by the railroad company to Mr. Mely was violated in any particular and that his [233] negligence was the cause of his death and not any negligence on the part of the company.

The Court: The motion will be denied.

Mr. McKevitt: We now request the Court to withdraw from the jury's consideration subdivision one of paragraph five of the complaint, namely: "Failure to provide A. E. Mely a safe place to work," upon the ground that there is no evidence in this record to sustain such allegation.

The Court: I will overrule the motion.

Mr. McKevitt: For the purpose of the record the defendant moves the Court to withdraw from the consideration of the jury subdivision 10 of paragraph five, for the reasons and upon the grounds heretofore stated. The subdivision is: "Failure to give A. E. Mely any warning of any kind whatsoever of the obstruction and danger ahead, as herein alleged."

The Court: Denied.

Mr. McKevitt: The Defendant makes the same Motion with reference to subdivision 11 of paragraph five, "Failure to place men, flares, or signals to give warning of said obstruction of said track a reasonable distance from said obstruction, so that A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision." The

reason for that lies in the fact that there was no rule of the company in effect at that time that would require any action of that kind on the part of the conductor of [234] train 1648.

The Court: Denied.

Mr. McKevitt: The same motion with reference to subdivision 12 of paragraph five: "Failing to properly protect train number 1648 while it was in such obscure position aforesaid, and in failing to properly protect train number 6015 from colliding therewith, by notice, signal, warning, flares, orders, or any other kind of notice sufficient to warn A. E. Mely of the obstruction of said main line track." It is the position of the defendant that the physical evidence is to the effect that within 980 feet he could see a portion of and within 850 feet he could see the complete rear end of the caboose and therefore there was no obstruction of the track.

The Court: Motion denied.

Mr. McKevitt: As an addition to the motion for directed verdict, the defendant moves the Court to withdraw from the consideration of the jury any question of violation by the company of any of its operating rules, which issue was contained in an amendment permitted by the Court over the objection of the defendant, for the reason and upon the ground that there is no evidence that the company violated any of its operating rules and there is no evidence that the death of Engineer Mely was caused by any rule violation [235] by the company, its agents or employees.

The Court: Denied.

(Argument of counsel to Jury.)

Instructions

The Court: I want to say to you Ladies and Gentlemen of the jury, that this case has been presented by as fine and capable lawyers as ever appear before this Court.

This is a serious case, as all action are, and it is brought by the Plaintiff Tillie Mely, as Administratrix of the Estate of A. E. Mely, deceased, against the Northern Pacific Railway Company, a corporation, in which she seeks to recover of and from the defendant the sum of $35,000.00 now reduced to $33,900.00 because of the death of her husband A. E. Mely, alleged to have been caused by the negligence of the defendant company.

This action is brought under the Federal Employer's Liability Act.

It is alleged in the Complaint that the Plaintiff Tillie Mely is the duly appointed administratrix of the estate of A. E. Mely, and is now acting as such; it is also alleged in the complaint that the defendant is a corporation organized under the laws of Wisconsin and operating its railroad in the State and District of Idaho. [236] It is alleged that the defendant long prior to November 11, 1951, employed the deceased as an engineer and that on the 11th day of November, 1951, deceased was employed as an engineer on a diesel locomotive to work on freight trains, loaded and unloaded with freight, and being shipped and received by the defendant company in interstate commerce. The ownership of the railroad track, bed and right-of-way

is alleged to have been in the defendant company upon which the locomotive was being operated, it is further alleged that the deceased was the engineer on the defendant company's engine No. 6015 going East and it collided with a train of cars being hauled by Northern Pacific Railway Company Engine No. 1648. It is alleged that because of and by reason of the said collision the decedent was killed, and that said collision and death of the said deceased was caused by the negligence of the defendant company.

It is further alleged that the negligence of the defendant consisted of failure to provide A. E. Mely a safe place to work; failure to give A. E. Mely any warning of any kind of the obstruction or danger ahead. [237]

It is alleged that defendant was further negligent by its failure to place men, flares, or signals, to give warning of said obstruction of said track within a reasonable distance of said obstruction, so that A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision.

It is alleged that the defendant was negligent in failing to properly protect train No. 1648 while it was in such obscure position, to properly protect train No. 6015 from colliding therewith, by notice, signal, warning, flares, orders or any other kind of notice sufficient to warn A. E. Mely of the obstruction of said Main line track.

Plaintiff alleges that at the time of the collision the said deceased was operating train 6015 which

was at the time a through train which had the right of way on defendant's track.

It is alleged that said Engineer Mely had a life expectancy of 27 years and that he was capable of earning the sum of $500.00 per month and that he, at all times gave to the plaintiff Tillie Mely financial support, the best of care, comfort and society and companionship, and that by reason of the death of said A. E. Mely this plaintiff Tillie Mely has been deprived of all financial support.

The defendant has filed its answer wherein it makes certain admissions and denials and also affirmative allegations. Defendant admits the corporate capacity of Northern Pacific Railway Company; admits the residence of the Plaintiff and that plaintiff Tillie Mely and A. E. Mely were husband and wife.

Denies all the other allegations of the plaintiff, that is, defendant denies that the plaintiff has been damaged in the sum of $35,000.00, now reduced to $33,900.00, or in any other amount by reason of the negligence of the defendant Company, and affirmatively alleges that the death of A. E. Mely was caused and brought about solely and alone through the negligence of the said A. E. Mely which negligence was the direct and proximate cause of his death.

It is the duty of the Court to instruct you as to the law governing the case, and you shall take such instructions to be the law. You shall consider the instructions as a whole and not pick out any particu-

lar instruction and place undue emphasis on such instruction.

You will also disregard any statement made by counsel on either side which is not sustained by the [239] evidence, and any evidence which may have been offered on either side and not admitted by the Court, and any evidence which after the admission was stricken by the Court.

The statements of the attorneys in the case, made at the trial and in their arguments, are not evidence and should not be considered by you as such.

Your verdict must be based upon the evidence. In arriving at it you should not discuss or consider anything in connection with this case except the evidence received in the trial.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

The plaintiiff, Tillie Mely, brings this action in a purely representative capacity, by reason of her being appointed administratrix of the estate of A. E. Mely, deceased.

The person she represents is alleged to be the kin of said deceased, that is Tillie Mely, the wife [240] of A. E. Mely, deceased. Tillie Mely is the real party in interest and in that sense is the real plaintiff in this case. It is compensation for the pecuniary loss suffered by her, if any, which plaintiff is en-

titled to recover if she is entitled to recover anything by this action; therefore, in considering the instructions given you on the measure of damages applicable to this case, you will regard Tillie Mely as the real party in interest and as the real plaintiff in this case, to the same effect as if she were so named in the complaint and in the instructions.

You are instructed that the defendant was not the insurer of Engineer Mely's safety. The plaintiff is not entitled to recover just because Mr. Mely was killed in the course of his employment. There is no presumption from the fact that his death occurred that it was caused by the negligence of the defendant. Before the plaintiff would be entitled to recover anything in this action, she must prove by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause, in whole or in part, of the death of her husband. [241]

The burden therefore is upon the plaintiff in the first instance to show by a preponderance of the evidence the cause of action set forth in her complaint.

By a preponderance of the evidence is not necessarily meant a greater number of witnesses, but a greater weight of the evidence. That is what the word preponderance means, evidence which convinces you that the truth lies upon this side or that it is that which is more convincing, more persuasive. The burden, therefore, is upon the plaintiff in this case to show that the defendant was guilty of negli-

gence in the respect charged in the complaint to which I have called your attention.

The testimony of one witness worthy of belief is sufficient for the proof of any fact in this case and would justify a verdict for or against either party in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness. [242]

The defendant Northern Pacific Railway Company is a corporation, and as such can act only through its officers and employees, who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is. It is admitted in the pleadings and therefore requires no proof that the two trains involved in the collision in question were the property of the defendant Northern Pacific Railway Company, and that they were in charge of, and being operated by employees and agents of the defendant, acting within the scope of their authority. Thus, their conduct shall be deemed by you to have been the conduct of the Northern Pacific Railway Company, a corporation.

"Negligence" is the failure to exercise reasonable and ordinary care, and by the term "reasonable and ordinary care" is meant that degree of care which an ordinarily careful and prudent person would

exercise under the same or similar circumstances or conditions. Negligence consists in the doing of some act which a reasonably prudent person would not do under the same or similar circumstances, or in the failure to do something which a reasonably prudent person would have done [243] under the same or similar circumstances and conditions. Negligence is never presumed, but must be established by proof the same as any other fact in the case.

Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the facts surrounding the circumstances, as shown by the evidence.

This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into, and in a sense are part of, the conduct in question. An act negligent under one set of conditions might not be so under another set of conditions; therefore, we ask: "What conduct might reasonably have been expected of a person of ordinary prudence under the same circumstances?" Our answer to that question gives us a criterion by which to determine whether or not the evidence before us proves negligence.

By the phrase 'reasonable care' or 'ordinary care,' as used in these instructions, is meant the exercise [244] of that care and caution as would be exercised by a reasonably prudent person under the existing circumstances.

'Ordinary' or 'reasonable' care are relative terms, and such care as is proportionate to, and commensurate with, the danger involved; in other words, the greater the danger involved the greater is the care required, although there is but one standard of care, and that is reasonable or ordinary care, as defined in these instructions.

Inasmuch as the amount of caution used by an ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by the law increases, as does the danger that reasonably should be apprehended.

The proximate cause of a death is that which in its ordinary sequence, unbroken by any intervening cause, produces death, and without which, death would not have occurred. [245]

It is not incumbent upon the plaintiff to prove all of the acts of negligence alleged in her complaint to entitle the plaintiff to a verdict in this case, but if the evidence introduced is such as to satisfy you, by a preponderance of all the evidence herein, that one or more of said acts of negligence, so alleged, in whole or in part, proximately caused injury and death to enginer A. E. Mely, then your verdict should be for the plaintiff.

This case is based upon a statute of the United States generally known as the Federal Employer's

Liability Act which provides that every common carrier by railroad while engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his personal representative, for the benefit of the surviving widow of such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

The Federal Act upon which plaintiff relies for a recovery in this case requires that before a plaintiff can recover she must first establish these things:

That the defendant was guilty of negligence as alleged in the complaint and that any such negligence was in whole or in part the cause of the decedent's death.

That the defendant railroad company was engaged in interstate commerce.

That a part, at least, of decedent's duties was in the furtherance of interstate commerce or directly or closely or substantially affected interstate commerce.

Failure of the plaintiff to establish either one of these elements prevents a recovery by her.

You are instructed, however, that the evidence here is undisputed to the effect that the Northern Pacific Railroad Company is a common carrier by railroad, engaging in interstate commerce, and further that decedent was at the time of his death engaged in his duties as an employee of the Northern Pacific Railway Company.

You are instructed that an employee of a railway company is never relieved from exercising reasonable care for his own safety and the safety of his fellow employees and cannot cast the burden of such care upon his employer. He owes this duty to himself and his fellow employees. If you find from the evidence in this case that under all the circumstances, Engineer [247] Mely failed to exercise reasonable care for his own safety, then he was guilty of negligence; and if you further find that such negligence was the sole and proximate cause of his death, plaintiff is not entitled to recover.

A. E. Mely is dead, he cannot testify here and in this case it is to be presumed that at the time of his injury and death he was taking ordinary care for his own concern, and that he was obeying the law. These presumptions are a form of prima facie evidence, and will support findings, by you, in accordace therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with these presumptions, it is your duty to weigh that evidence against the presumptions, and also any evidence that may support the presumptions, and then to determine which, if either, preponderates. This also applies to all other employes that lost their lives in this action.

If you find from a preponderance of all the evidence that the defendant in this case was negligent, and its negligence was the proximate cause of the injury and death of engineer A. E. Mely, the defendant is liable in damages, although the defendant's

negligence [248] was not the sole proximate cause of the injury and death of A. E. Mely, and if you further find from the evidence that engineer A. E. Mely was guilty of contributory negligence, this fact shall not be a total bar to recovery, but the damages shall be diminished by you in proportion to the amount of negligence attributable to engineer A. E. Mely.

A continuous duty exists on the part of a carrier, such as the defendant in this case, to use ordinary care in furnishing its employees with a reasonably safe place within which to work. The amount of caution required of a railroad company in the exercise of ordinary care, to furnish its employees a reasonably safe place within which to work, increases or decreases as to the dangers that reasonably should be apprehended.

In the absence of knowledge or notice to the contrary and in the absence of circumstances that caution him, or would caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work, and he may rely and act on that assumption.

That is more or less a duplicate of an instruction I have formerly given. [249]

There has been introduced in evidence what is designated as rules 93, 99, 101, 108 and other general rules read to you from the Consolidated Code of Operating Rules and General Instructions. You are advised that these rules are promulgated by the Rail-

road Companies for the safe operation of their trains and do not have the effect of law.

You are further advised that it is for you to determine whether or not such rules are reasonable and regardless of any violation of the rules, whether the defendant was negligent in any manner and whether the negligence was the proximate cause of the death of the deceased Mely and whether the plaintiff Tillie Mely was damaged thereby.

This rule book you will be permitted to take with you to your juryroom.

You must weight and consider this case without regard to sympathy, prejudice, or passion for or against any party to this action.

Certain witnesses have been called here commonly referred to as expert witnesses; and insofar as the testimony of the expert witnesses is concerned you will consider that and treat it in the same manner as you [250] would treat any other testimony in the case. The simple fact that it was offered by experts does not compel you to take their testimony in preference to any other, but you should give the testimony of the expert witnesses the same weight and the same consideration, everything else being equal, as that of any other witness.

The value of an expert's opinion depends not only upon the qualifications and experience of the witness, but also upon the fact which he takes into consideration and upon which he bases his opinion. If the facts assumed and which are made the basis of the opinion are not established by the proof, then the opinion would have no basis upon which to rest

and would be of no value and the jury cannot take the facts assumed to be true simply because they were assumed but you will look to the proof to determine whether they are proven or not.

As I have stated to you plaintiff brings this action under a law of the United States known as the "Federal Employer's Liability Act." This law governs this case. Under this law—if you find for the plaintiff—she is entitled to recover only such an amount as would represent fair and adequate compensation for the money loss which the evidence may show that she has sustained by reason [251] of the death of her husband. I instruct you, that under this law, she is not entitled to compensation for wounded feelings, for loss of companionship; consortium, comfort of the deceased, or for sympathy. The true test is, what, in view of all the facts in evidence, was the probable money interest of the widow in the continuance of the life of her husband? The proper estimate may be arrived at by taking into account the occupation of the deceased, the income derived therefrom, the period of time that he would probably be engaged in said occupation, his health, age, and the contribution made by him from such income to his wife. The measure of recovery is such amount of damages as will fairly or reasonably compensate the widow of the deceased for the loss of money benefits she might reasonably have received if the deceased had not been killed.

I further instruct you that if you find for the plaintiff, any damages that you may award her must

be based upon the life expectancy of her deceased husband which was at the time of is death 17.40 years.

The fact that the Court has instructed you upon the rules governing the measure of damages is not to be taken by you as any indication on the part of the [252] Court that it believes or does not believe that the plaintiff is entitled to recover damages. This instruction is given you solely to guide you in arriving at the amount of your verdict only in the event that you find from the evidence and instructions given you by the Court that the plaintiff is entitled to recover. If, from the evidence and instructions, you find that the plaintiff should not recover then you will disregard entirely the instructions that have been given you concerning the measure of damages.

If, after deliberating on this matter, you determine that the plaintiff is entitled to recover, you should determine the amount by an open and frank discussion among your members and you should not arrive at any amount to be allowed by each stating the amount you think should be allowed, then adding the several amounts together and dividing the total by twelve or by the number taking part in such method. This would be a quotient verdict and you should not, under your oath as jurors, arrive at any such verdict in such manner.

In this Court it is necessary that you all agree in arriving at a verdict. When you retire you will first elect one of your number as foreman and when you have agreed upon a verdict your fore-

man alone will sign the verdict. Forms of verdict have been prepared for your use and you will have no trouble in using the form which will correctly reflect your finding. You will see that one form contains a blank space for the amount of damages you allow, if any, if you find in favor of the plaintiff against the defendant; another form will be given you on which there is no blank space in case you find for the defendant and against the plaintiff.

When you arrive at a verdict it will be returned into open Court.

It is now necessary for me again to take up matters of law with counsel. You will be excused for a moment and I will call you back.

The Court: Does Plaintiff have any exceptions to offer to the instructions?

Mr. Shone: None, your Honor.

The Court: Does the defendant have any exceptions?

Mr. McKevitt: The Court having instructed the jury as to the law of this case and the jury not, at the time of taking these exceptions, having retired to consider its verdict—the defendant excepts to the failure of the Court to give defendant's requested instruction number 6, this exception is based upon the ground that under the evidence the defendant was entitled to have a specific instruction given to the jury that if they found that rule 93 of the Code had been violated, which rule was adopted for the safety, among other things, of the deceased Engineer Mely, then he was guilty of

negligence; the instruction, however, further provided that they must find that that negligence, if any, was the proximate cause of his death, in whole or in part. That completes my exceptions.

The Court: In passing on that instruction, the reason I rejected it was because, as a whole, I didn't feel that it should be presented to the jury. You may recall the jury Mr. Bailiff.

Mrs. Farmer, the alternative juror—you may be excused from further service here and I want to thank you for standing by.

The bailiffs will be sworn and the jury may retire to consider their verdict.

October 2, 1952—8:30 P.M.

The Court: Ladies and gentlemen of the jury, it was necessary for me to call you in here as it is somewhat irregular for me to send messages in to you in the absence of counsel, so I have called counsel here so that I can answer your question in their presence. I want to say to you that in the lengthy testimony that has been given here during the course of this trial, it has been difficult for me to remember the testimony, as I know it must be for you, however, and the only way I could go into it would be to take the necessary time to have the Reporter go over his notes—I think I can say to you though, that this train was ordered out and that there was no advice given by the person giving the orders to take this train out, whether he be called the train dispatcher or whoever it was, that there was another extra train proceeding on

the track, now, the question of whether that was negligence or not, for them not to so advise Mr. Mely, that is a question entirely for you to decide.

Juror: Your Honor, may I ask a question?

The Court: Yes, you may.

Juror: What we wish to know is—is there a railroad rule which makes it obligatory for a dispatcher to include such information in his orders?

The Court: That is a question, as I advised you—the rules that you have before you are rules adopted by the railroad companies, and if there is anything that is unreasonable in the operation of those trains that is not included in the rules, you have a perfect right to take that into consideration, as to whether you feel that that matter was negligence on the part of the railroad company, and if you determine that it was negligence—that is for you and not the Court, and any suggestion or inference that you might get from what I say you should pay no attention to that, because you are the sole judges as to whether or not the railroad company was negligent in sending this train out without advising of the train which was preceding it on the track, and I can say to you that the evidence shows that they did not so advise Mr. Mely.

Juror: We knew that they did not so advise and there was a discussion as to whether there is a rule making it obligatory on the part of the dispatcher to give that advice.

The Court: All I can say to you in regard to that is that I am not familiar with the rules—you

have heard all the evidence and you are to determine whether such a proceeding should be followed as to advise the operator of the train that there was another train on the main track. That is all I can say to you because that is a matter that you will determine.

You may step outside a moment but don't go to your jury room yet.

(In the absence of the jury.)

The Court: Now, counsel may take exception to anything I have said to the jury.

Mr. McKevitt: Your Honor has just had the jury retire but not for the purpose of deliberation as yet, and I just want to make this observation. I can see why your Honor couldn't answer the juror's question and for the purpose of this record, and to answer the question of Juror Number 2. There has not been introduced in evidence any rule of this Company, the Northern Pacific Railway Company, defendant, that required the dispatcher at East Lewiston to advise Conductor Mely that 1648 had gone out ahead of his train. That was the exact question that the juror propounded to your Honor as to whether the evidence disclosed that fact. The record may show from the standpoint of the defendant Northern Pacific Railway Company that there is no rule of any kind or any character that required the dispatcher at Lewiston, on the morning of November 11, 1951, to have advised Engineer Mely or the conductor in charge of these trains that extra 1648 had preceded extra 6015 out of the East Lewiston yards. [258]

The Court: I don't know whether the train orders come from the dispatcher, or who they come from, but I know that both sides argued fully the question of the train dispatcher not giving this man any orders. I told the jury that I wasn't acquainted with the rules; that they had the book of rules and the only thing they could do was to determine whether or not whoever was in charge was negligent in not advising of the train on the track ahead.

The Reporter will note your exception.

The Bailiff will return the jury to the jury room for their deliberation.

The Court will be in recess. [259]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States District Court in and for the District of Idaho, and

I certify that I took the testimony and proceedings in and about the trial of the above-entitled cause in shorthand and thereafter transcribed the same into longhand (typing), and

I certify that the foregoing transcript, consisting of pages numbered to 259, is a true and correct transcript of the evidence given and the proceedings had in and about the trial.

In Witness Whereof I have hereunto set my hand this 15th day of September, 1953.

/s/ G. C. VAUGHAN,
Reporter.

[Endorsed]: Filed September 15, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP), to wit:

1. Complaint.
2. Answer.
3. Defendant's Requested Instruction No. 6.
4. Verdict of the Jury.
5. Judgment.
6. Motion to Set Aside Verdict and Judgment Entered Thereon, or in the Alternative for a New Trial, With Affidavits Attached.
7. Order Denying Motion.
8. Reporter's Transcript (Instructions of the Court Included in Transcript).
9. Designation of Contents of Record on Appeal.
10. Supersedeas Bond.
11. Notice of Appeal.
12. Order Extending Time for Appeal.
13. Exhibits Nos. 1 to 25, inclusive; 26-1 to 26-7, inclusive, and 27.

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said Court, this 16th day of September, 1953.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 14037. United States Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, Appellant, vs. Tillie Mely, as Administratrix of the Estate of A. E. Mely, Deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Central Division.

Filed September 18, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals,
Ninth Circuit

No. 14,037

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellant,

vs.

TILLIE MELY, as Administratrix of the Estate of A. E. Mely, Deceased,

Appellee.

DESIGNATION OF RECORD ON APPEAL

The Northern Pacific Railway Company, appellant above named, hereby adopts the "Designation of Record on Appeal" which was served on attorneys for appellee on June 24, 1953, and filed with the Clerk of the United States District Court for the District of Idaho on June 25, 1953.

CANNON, McKEVITT & FRASER,

By /s/ F. J. McKEVITT;

CLEMENTS & CLEMENTS,

By /s/ V. R. CLEMENTS,
Attorneys for Appellant.

[Endorsed]: Filed September 25, 1953.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT RELIES

In compliance with Rule 17 this appellant makes the following statement of points:

In support of its contention that the District Court should have granted its motion for a directed verdict made at the close of appellee's evidence and renewed at the close of all the evidence, appellant asserts:

(1) The evidence conclusively showed as a matter of law that the death of appellee's decedent was caused and brought about solely and alone through his own negligence, which was the direct and proximate cause of his death.

(2) The complaint as amended charged the defendant railway company with thirteen separate acts of negligence. At the close of all the evidence the Court withdrew eight of said charges from the jury's consideration and submitted to it for determination the following charges of negligence:

(a) Failure to provide A. E. Mely a safe place to work;

(b) Failure to give A. E. Mely any warning of any kind whatever of the obstruction and danger ahead;

(c) Failure to place men, flares or signals to give warning of said obstruction of said track a reasonable distance from said obstruction so that

A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision;

(d) Failing to protect Train No. 1648 while it was in such obscure position aforesaid and in failing to protect Train No. 6015 from colliding therewith by notice, signal, warning flares, orders or any other kind of notice sufficient to warn A. E. Mely of the obstruction of said main line track;

(e) Violation of Rules 99, 101 and 108.

There was no evidence to support subdivision (a) since it was not shown there was any defect in roadbed or equipment.

Referring to subdivision (b). The evidence disclosed that the decedent's death was caused by a rear-end collision between a train of which he was engineer and another train stationary within Yard Limits at Arrow, Idaho. No operating rule of the company required that the conductor in charge of the train standing within the yard limits protect the same against other trains.

With reference to subdivisions (c) and (d), the same reasons apply.

With reference to subdivision (e). The rules therein referred to did not apply to trains operating within yard limits or standing within yard limits and no evidence was introduced showing a violation of said rules.

(3) The evidence conclusively showed that the death of appellee's decedent was caused and brought about solely and alone through his own negligence in violating Operating Rule 93 enacted for the pro-

tection of himself and his co-employees. That rule provided:

"Within yard limits second and inferior class, extra trains and engines must move at restricted speed."

The evidence conclusively showed that the train which was being operated by appellee's decedent was an Extra train. "Restricted Speed" as that term is used in the rule above referred to is defined in the operating rules as follows:

"Proceed prepared to stop short of train, obstruction or anything that may require the speed of the train to be reduced."

The evidence conclusively showed that when the caboose of the train stationary within yard limits first came into the view of the deceased engineer he was operating his train at such a rate of speed as rendered it impossible for him to "stop short" of the rear of said train. The speed of his train at said time was conclusively shown to be 47 miles per hour. The evidence further conclusively showed that the maximum speed for the type of train he was operating on the entire run leading up to the accident was thirty miles per hour.

In support of its alternative motion for a new trial, appellant states:

(1) The verdict and judgment are contrary to law.

(2) The verdict and judgment are contrary to the evidence and against the weight of the evidence.

(3) There was no substantial evidence that the appellant was guilty of negligence, which negligence in whole or in part contributed to the death of appellee's husband.

(4) The evidence conclusively showed that the sole and proximate cause of decedent's death was his own negligence.

(5) The Court erred in denying appellant's motion to direct a verdict in its favor at the close of appellee's case and at the close of all the evidence.

(6) The Court erred in failing to give the following instruction requested by the appellant or an instruction substantially similar thereto:

"The defendant has introduced in evidence what is designated as Rule 93 of the Consolidated Code of Operating Rules and General Instructions:

" 'Within yard limits, second and inferior class, extra trains and engines must move at restricted speed.'

"The defendant has also introduced in evidence the following definition set forth in the Consolidated Code of Operating Rules and General Instructions:

" 'Restricted Speed — Proceed prepared to stop short of train, obstruction, or anything that may require the speed of the train to be reduced.'

"I instruct you that said rule was in force and effect at the time Engineer Mely was operating Engine No. 6015 and that said rule was promulgated for the safety of Engineer Mely, his fellow employees, and the public.

"I further instruct you that in the operation of Engine No. 6015, it was the duty of plaintiff's decedent, A. E. Mely, the engineer, to abide by this rule and to operate his engine in accordance therewith.

"I further instruct you that if you find from the evidence that Engineer Mely violated this rule, then he was guilty of negligence.

"If you find from the evidence that such negligence was the sole and proximate cause of his death, then your verdict should be for the defendant."

Exception to the Court's failure to give the above instruction was duly and timely taken and noted.

(7) The Court erred in admitting over the objection of appellant the testimony of appellee's witness, Merle C. Myhre, called by appellee for the sole purpose of testifying as an expert as to the meaning, interpretation and application of the rules of the appellant, Northern Pacific Railway Company, admitted in evidence and designated as "Consolidated Code of Operating Rules and General Instructions." Said rules were plain and unambiguous and there was no necessity for appellee to have called an expert witness to testify as to their meaning and application.

(8) The Court erred in admitting over appellant's objection Rules 99, 101 and 108 of the Consolidated Code of Operating Rules and General Instructions above referred to.

(9) The verdict of the jury was based upon a supposed fact not established by the evidence.

(10) The Court erred in submitting to the jury the question of the alleged failure of the appellant to provide appellee's decedent with a safe place to work.

(11) The Court erred in submitting to the jury the alleged negligence charged in the five subdivisions above referred to.

(12) Appellant timely moved during the trial in separate motions to withdraw from the jury's consideration each of the five alleged charges of negligence finally submitted to them.

CANNON, McKEVITT &
FRASER,

By F. J. McKEVITT;

CLEMENTS & CLEMENTS,

By V. R. CLEMENTS,
Attorneys for Appellant.

[Endorsed]: Filed September 30, 1953.

No. 14037

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Appellant,*

vs.

TILLIE MELY, as Administratrix of the Estate of A. E. Mely, Deceased, *Appellee.*

BRIEF OF APPELLANT

Appeal from the United States District Court
for the District of Idaho
Central Division

HONORABLE CHASE A. CLARK
United States District Judge

CANNON, MCKEVITT & FRASER
711 Old National Bank Building
Spokane, Washington

VERNER R. CLEMENTS
Weisgerber Building
Lewiston, Idaho

Attorneys for Appellant

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The death of plaintiff's intestate was caused and brought about by his own negligence, which was the direct and proximate cause of his death. Plaintiff's intestate was the engineer in charge of an *extra* freight train which collided with the rear end of another *extra* freight train, which was stationary and within *yard limits* at Arrow, Idaho. The collision occurred in broad daylight with no impairment to vision as the result of weather conditions. Immediately prior to the collision the deceased engineer was operating his train at a dangerous and excessive rate of speed, in violation of specific operating rules of the appellant requiring extra freight trains to Operating Rules define restricted speed as folmove at *restricted speed* within yard limits. The lows: (Italics supplied.)

> "Proceed prepared to stop short of train, obstruction or anything that might require the speed of a train to be reduced."

TABLE OF AUTHORITIES CITED

No. 14037

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Appellant,*

vs.

TILLIE MELY, as Administratrix of the Estate of A. E. Mely, Deceased, *Appellee.*

BRIEF OF APPELLANT

STATEMENT AS TO JURISDICTION

This is a suit arising under the provisions of the Federal Employers' Liability Act. (45 USCA, Sec. 51 et seq. (R. 3.)

Appellant was engaged in interstate commerce and the deceased engineer at the time of his death was operating appellant's train in interstate commerce. (R. 4-5.) Appellant in its answer admitted that at the time of the collision it was engaged in interstate commerce and that the deceased engineer was engaged in interstate commerce. (R.10.) Jurisdiction is unquestioned.

STATEMENT OF THE CASE

Appellee, as the Administratrix of the Estate of A. E. Mely, Deceased, brought action in the District Court of the United States, for the District of Idaho, Central Division, to recover damages in the sum of $35,000.00 for the alleged wrongful death of her husband. The case was submitted to the jury for determination and a verdict in the sum of $15,000.00 was returned in favor of appellee. (R.13.) Judgment thereon, plus costs, was entered. (R.13-14.) The decedent engineer was in charge of one of appellant's extra freight trains, No. 6015. The four Diesel units and a caboose left East Lewiston, Idaho, at 10:35 A. M. on the 11th of November, 1951. (R.67.) It proceeded easterly to the station of North Lapwai where it picked up 15 freight cars. (R.68.) It continued on towards Arrow, Idaho, where it had orders to pick up additional cars. R. 121-122.)

Extra freight train No. 1648 had preceded No. 6015 out of East Lewiston, departing therefrom between 9:15 and 9:20 A. M. Leaving East Lewiston it consisted simply of the engine and a caboose. (R. 39.) At Forbay, which is two miles east of East Lewiston, it picked up some 86 cars. (R. 40.) Departing therefrom it did some intermediate switching at North Lapwai, Idaho, and then continued on to Arrow, Idaho, arriving there

at approximately 10:40 or 10:45 A. M. Some additional cars were picked up at that point by the crew of No. 1648. (R. 40-41.)

Within the yard limits of Arrow, Idaho, No. 6015 crashed into the caboose of No. 1648 which was stationary at the time. The collision occurred at 11:10 A. M. (R. 45.)

Appellant introduced in evidence a map (Exhibit, 22) which embraces an area beginning at the east end of Bridge 126 shown thereon and includes the entire yards at Arrow station. (R. 184.) As shown on the easterly end of the exhibit, there is a yard limit sign. (R. 184.) One mile west thereof is a warning board indicating that the yard limits begin one mile distant therefrom. (R. 185.) Within the yard limits and on the north side of the track there existed a curve and bluff; the east end of the bluff was approximately 1080 feet from the point of collision. (R. 188.) South of the main line track, on which No. 6015 was traveling, is a passing track; standing thereon were six or eight box cars west of the west end of the caboose. (R. 59.) These cars, however, in no wise impaired the vision the deceased engineer would have of the rear end of the caboose when he was 980.3 feet westerly thereof. (R. 188.) In other words, decedent had this distance in which to stop his train had he been moving at restricted speed.

There was introduced in evidence what is designated as The Consolidated Code of Operating Rules and General Instructions. (Ex. 24; R. 154.) The decedent engineer was thoroughly familiar with these rules. (R. 181-182.) They controlled the operation of his train at the time and place in question.

Rule 93, which was violated by the deceased engineer, is set out in its entirety:

> "93. Within yard limits the main track may be used, clearing first class trains when due to leave the last station where time is shown. In case of failure to clear the main track, protection must be given as prescribed by Rule 99.
>
> Within yard limits the main track may be used without protecting against second and inferior class, extra trains and engines.
>
> Within yard limits second and inferior class, extra trains and engines must move at restricted speed.
>
> Within yard limits when running against the current of traffic or on a portion of double or three or more tracks used as a single track, all trains and engines must move at restricted speed."

The applicable portions of said rule insofar as it pertains to the instant case are paragraphs 2 and 3.

The term "restricted speed", as used in the rule is defined in the Consolidated Code of Operating Rules (Ex. 24) as follows:

"Proceed prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced." (Ex. 24, page 9.)

The following material facts are undisputed:

1. Trains No. 1648 and No. 6015 were extra trains. (R. 166, 57, 200.) In the Consolidated Code an "extra train" is defined as follows:

"Extra Train.—A train not authorized by timetable schedule. * * *" (Ex. 24, page 6.)

2. The collision occurred within yard limits. (Ex. 24.)

3. Train No. 6015 immediately prior to the collision was not being operated at restricted speed; this for the reasons that

(a) After being "dynamited" (R. 75) it still continued on its course and crashed into the caboose;

(b) 1300 feet from point of collision and within yard limits the speed of No. 6015 was 47 miles per hour. (R. 227.) (Defts. Ex. 27—speed tape on Engine No. 6015.)

(c) There was no decrease in the speed of No. 6015 from the yard limit board until after the train had been dynamited. (R. 96.)

(d) Had No. 6015 been operated even at a speed of

30 miles per hour it could have been brought to a stop within 700 to 800 feet. (R. 229.)

(e) The maximum rate of speed permitted freight trains on the entire line of railway in question was 30 miles per hour. (R. 176-177.)

4. The deceased engineer knew that he had to make a stop at Arrow for the purpose of picking up cars at that point. (R. 126.)

The complaint contained twelve specific acts of alleged negligence on the part of the appellant. (R. 6-7.)

During the course of the trial the Court permitted the complaint to be amended by an additional count charging the appellant with negligence in the violation of Rules 99, 101 and 108. (R. 141.) These rules read as follows:

> "99. When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fusees. When recalled and safety to the train will permit, he may return.
>
> When the conditions require, he will leave the torpedoes and a lighted fusee.
>
> The front of the train must be protected in the same way when necessary by the forward brakeman, fireman, or other competent employe.

When a train is moving under circumstances in which it may be overtaken by another train, the flagman must take such action as may be necessary to insure full protection. By night, or by day when the view is obscured, lighted fusees must be thrown off at proper intervals.

When day signals cannot be plainly seen, owing to weather or other conditions, night signals must also be used. Conductors and engineers are responsible for the protection of their trains." (Ex. 24, p. 47.)

"101. Trains must be fully protected against any known condition not covered by the rules, which interferes with their safe passage." (Ex. 24, p. 50.)

"108. In case of doubt or uncertainty, the safe course must be taken." (Ex. 24, p. 55.)

In support of the contention that the Company had violated the foregoing rules, appellee called as a witness Merle C. Maury who testified in answer to a hypothetical question (R. 141 et seq.) as to what "Operating Rules and General Instructions of the Northern Pacific Railway Company would be applicable" to the situation existing immediately prior to the accident, that Rules 99 and 108 governed (R. 148 et seq.); in other words, the attempt was made to show that these rules had been violated by Eddie Feehan, the conductor in charge of No. 1648, who was killed in this collision.

Following the denial of appellant's motion for a directed verdict made at the close of appellee's case, the Court withdrew from the consideration of the jury counts 2, 3, 4, 5, 6, 7, 8 and 9, leaving counts 1, 10, 11 and 12. (R. 181.) These counts follow:

(1) Failure to provide A. E. Mely a safe place to work;

(10) Failure to give A. E. Mely any warning of any kind whatsoever of the obstruction and danger ahead, as herein alleged;

(11) Failure to place men, flares or signals to give warning of said obstruction of said track a reasonable distance from said obstruction so that A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision;

(12) Failing to properly protect Train No. 1648 while it was in such obscure position aforesaid, and in failing to protect Train No. 6015 from colliding therewith by notice, signal, warning, flares, orders or any other kind of notice sufficient to warn A. E. Mely of the obstruction of said main line track.

Following the denial of appellant's motion for a directed verdict, made at the close of all the evidence (R. 235), appellant separately moved the Court to withdraw from the jury's consideration counts 1, 10, 11 and

12. In addition thereto appellant moved the Court to withdraw from the jury's consideration the count charging a violation of Rules 99, 101 and 108 upon the ground that there was no evidence that said rules had been violated or that their violation in any manner contributed to the death of the engineer. This motion was denied. (R. 235-236.)

Upon this state of the record it is the contention of appellant that the deceased engineer was guilty of negligence as a matter of law and that its motion for a directed verdict, made at the close of all the evidence, should have been granted and that its motion to set aside the verdict and judgment, or in the alternative for a new trial (R. 14 et seq.) should have been granted.

SPECIFICATIONS OF ERROR

I

The District Court erred in denying appellant's motion for a directed verdict. (R. 235.)

II

The District Court erred in denying appellant's motion to set aside the verdict and judgment or in the alternative for a new trial. (R. 14 et seq.)

III

The District Court erred in entering judgment on the verdict. (R. 13.)

IV

The District Court erred in failing to give appellant's Requested Instruction No. 6 (R. 11):

> "The defendant has introduced in evidence what is designated as Rule 93 of the Consolidated Code of Operating Rules and General Instructions:
>
> 'Within yard limits, second and inferior class, extra trains and engines must move at restricted speed.'
>
> The defendant has also introduced in evidence the following definition set forth in the Consolidated Code of Operating Rules and General Instructions:
>
> 'Restricted Speed—Proceed prepared to stop short of train, obstruction, or anything that may require the speed of the train to be reduced.'
>
> I instruct you that said rule was in force and effect at the time Engineer Mely was operating Engine No. 6015 and that said rule was promulgated for the safety of Engineer Mely, his fellow employees, and the public.
>
> I further instruct you that in the operation of Engine No. 6015, it was the duty of plaintiff's decedent, A. E. Mely, the engineer, to abide by this rule and to operate his engine in accordance therewith.
>
> I further instruct you that if you find from the evidence that Engineer Mely violated this rule, then he was guilty of negligence.

If you find from the evidence that such negligence was the sole and proximate cause of his death, then your verdict should be for the defendant."

V

The District Court erred in submitting fo jury determination the question of whether or not appellant was negligent in failing to furnish deceased engineer with a safe place in which to work. The portion of the Instruction which is complained of is as follows:

"A continuous duty exists on the part of a carrier, such as the defendant in this case, to use ordinary care in furnishing its employees with a reasonably safe place within which to work. The amount of caution required of a railroad company in the exercise of ordinary care, to furnish its employees a reasonably safe place within which to work, increases or decreases as to the dangers that reasonably should be apprehended.

In the absence of knowledge or notice to the contrary and in the absence of circumstances that caution him, or would caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work, and he may rely and act on that assumption." (R. 247.)

The appellant timely moved to have this charge of negligence (Sub-division 1, paragraph V of the Complaint) withdrawn from the jury's consideration on the ground that there was no evidence to sustain the submission of such an issue. (R. 235.)

VI

The District Court erred in submitting for jury determination the question of whether or not the appellant had violated Rules 99, 101 and 108. The portion of the Instruction complained of is as follows:

> "There has been introduced in evidence what is designated as Rules * * * 99, 101, 108 and other general rules read to you from the Consolidated Code of Operating Rules and General Instructions. You are advised that these rules are promulgated by the railroad companies for the safe operation of their trains and do not have the effect of law.
>
> You are further advised that it is for you to determine whether or not such rules are reasonable and regardless of any violation of the rules, whether the defendant was negligent in any manner and whether the negligence was the proximate cause of the death of the deceased Mely and whether the plaintiff Tillie Mely was damaged thereby." (R. 247-248.)

The appellant timely moved to have this charge of negligence withdrawn from the jury's consideration for the reason and upon the ground that there was no evidence that the company had violated any of its operating rules and no evidence that the death of the engineer was caused by any rule violation by the company, its agents or employees. (R. 236.)

VII

The District Court erred in permitting so-called ex-

pert testimony over appellant's objection to the effect that the appellant was guilty of rule violation which contributed to the death of the deceased engineer.

"Q. Now, Mr. Maury, under the facts as presented here in the Court Room, under what rule, in your opinion would you proceed in protecting, if necessary, within the yard limit at Arrow Station?

MR. McKEVITT: I object to that question on the ground that it is not properly framed and I object to it on the second ground that it is an attempt to establish a rule violation by the Northern Pacific Railroad Company, which rule violation will probably be urged as the cause of Mr. Mely's death, when that rule violation has not been pleaded in the complaint. As I pointed out to your Honor, there are twelve separate subdivisions of negligence contained in paragraph five of this complaint, and not in one of them, nor in any place in this complaint have we ever been apprised, until this moment, that the Northern Pacific was going to be charged with this man's death because of a violation of a rule which the Northern Pacific had established for this man's protection. (R. 139.)

THE COURT: The last part of your objection will be overruled; the first part will be sustained. I think the proper way to ask this question would be to assume certain facts and then ask it." (R. 140.)

* * *

"Q. Now, assuming as true the following facts, that on November 11, 1951, extra train No. 1648 left East Lewiston at 10:35 a. m., and proceeded easterly into the yards and to the Station at Arrow

in the State of Idaho, and while at Arrow the crew switched cars onto the main single line track within the station yards and built up a train of 85 cars with a caboose at the west end thereof, and with a locomotive at the east end thereof, standing upon the track in front of the Station House; that at that time and immediately before, there was on the south side of the track a siding which contained 15 box cars which were about 346 feet —that is, the most westerly car of the box cars on the siding were about 346 feet west of the caboose on the main line; that the 85 cars and caboose were stationary; that that train had been in the yards for about 25 minutes; that just west of this caboose standing on the main line, 604 feet, was a switch; that west of the switch commences a curve and looking at the curve it is a left curve and then it goes into a right curve around a cliff; that the railroad has no block system between East Lewiston and Arrow station; that this was a Sunday, in which there was no knowledge on the part of that crew, stationed within the yards, that a train had left East Lewiston that morning, following their train, and with the knowledge that extras do run over that track on Sundays, under those circumstances and the further fact that the end forty or sixty cars of the 85 cars standing on the main line track were logging cars, about as high as an ordinary flatcar. Under those circumstances what rule, in your opinion, of the Consolidated Code of Operating Rules and General Instructions of the Northern Pacific Railway Company would be applicable? (R. 141-142.)

MR. McKEVITT: I desire to object to the hypothetical question on the following grounds:

1. They have injected into this case issues not contained in the complaint.

2. That they have not sufficiently qualified this witness to testify on the matters and things contained within the hypothetical question.

3. That this witness is not qualified to testify what rule is applicable and what rule is not applicable.

4. There has been no evidence introduced here which would indicate in any manner that a rule violation by the Company was or could have been the proximate cause of this man's death. If the objection is not well taken, or any portion of it, in addition, I object to the form of the question as not containing all of the factors required in a hypothetical question under the conditions as they exist. Now, if the objection is not well taken I desire to examine the witness on voir dire.

THE COURT: The objection will be overruled." (R. 143.)

* * *

"BY MR. SHONE:

Q. Now will you answer the hypothetical question—do you remember the question I put to you?

A. Yes, I think I do.

MR. McKEVITT: I have already made my objection on several grounds.

THE COURT: Yes, you have, go ahead.

Q. What rule, in your opinion, would govern that situation?

A. Could I explain in my own words?

Q. You just tell me what rule first?

THE COURT: I think you should let him explain it in his own words.

MR. SHONE: Yes, O.K.

A. In various examining cars I have been in oral examinations and written examinations, they always stress one point, that is rule 108.

MR. McKEVITT: Your Honor, I object to this as not responsive, he was asked what rule would govern.

THE COURT: I believe I will let the witness go ahead.

A. The reason I referred to rule 108, it is the rule that says in case of uncertainty or doubt follow the safe course. Well, that's a general rule, whenever in case of uncertainty or doubt, you follow a specific rule which is 99 the flagging rule to protect your own train. (R. 148.)

Q. And that is the rule you would have followed, in your opinion, under these circumstances?

A. Yes, sir.

MR. SHONE: We offer in evidence rule 99.

MR. McKEVITT: We object as incompetent, irrelevant and immaterial and not within the issues.

THE COURT: It may be admitted and you may read it into the record.

MR. SHONE: Rule 99 of the consolidated code

of operating rules and general instructions found on page 48.

MR. McKEVITT: That does not apply.

MR. SHONE: Just a minute, it is page 47, Rule 99:

'When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with the flagman's signals a sufficient distance to insure protection, taking two torpedoes and when necessary, in addition displaying lighted fusees, and when recalled and safety to the train will permit, he may return. When conditions require, he will leave the torpedoes and a lighted fusee. When a train is moving under circumstances in which it may be overtaken by another train, the flagman must take such action as may be necessary to insure full protection, by night or by day, when the view is obscured lighted fusees must be thrown off at proper intervals. When day signals cannot be plainly seen owing to weather or other conditions, night signals must be used. Conductors and Engineers are responsible for the protection of their trains.' (R. 149.)

Q. Now, you spoke of a general rule, 108; would that as a general rule be applicable under the facts as I have stated them to you?

MR. McKEVITT: Objected to as incompetent, irrelevant and immaterial and for the additional reasons heretofore stated.

THE COURT: He may answer.

A. Yes sir.

MR. SHONE: We offer in evidence rule 108 of the consolidated code of operating rules and general instructions.

MR. McKEVITT: We object to that as incompetent and immaterial and not within the issues of this case.

THE COURT: It may be admitted." (R. 150.)

* * *

"Q. Are there any other rules in this rule book that we are speaking about which in your opinion would govern the circumstances and facts as I have stated them to you?

MR. McKEVITT: I want to object to the form of the question and object to it on the ground that it is vague and uncertain and on the ground that it is not within the issues of this case.

THE COURT: He may answer.

A. Yes, there would be another one.

Q. What one?

A. Rule 101.

MR. SHONE: We offer in evidence rule 101.

MR. McKEVITT: We object on the grounds previously stated with reference to the other rules.

THE COURT: It may be admitted and you may read it into the record. (R. 151.)

MR. SHONE: Rule 101 which plaintiff has offered as an exhibit and found on page 50 of the

consolidated code of operating rules and general instructions reads as follows:

'Trains must be fully protected against any known condition not covered by the rules, which interferes with their safe passage'." (R. 152.)

SUMMARY OF ARGUMENT

1. Appellant thinks it clear that the decedent engineer was guilty of negligence as a matter of law because of his violation of Rule 93. This rule, with the accompanying definition of restricted speed, was a *specific* and not a *general* rule of operation, and subject to interpretation by the District Court as a matter of law and not for jury determination. That this rule was violated cannot be challenged. Deceased did not have his train under the control required by the rule. If he had obeyed this rule there would have been no collision. His duty was as clear as its performance was easy. His breach of duty constituted the sole and efficient cause of his death. Therefore, the District Court should have granted appellant's motion for a directed verdict. (Specification of Error No. 1.)

Southern Ry. Co. vs. *Hylton,* (6th Cir.) 37 F. (2d) 843;

Southern Ry. Co. vs. *Hylton,* (6th Cir.) 87 F. (2d) 393 (same case);

Unadilla Valley Ry. Co. vs. *Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224;

St. Louis, Southwestern Ry. Co. vs. *Simpson,* 286 U. S. 346, 52 S. Ct. 520, 76 L. Ed. 1152;

Van Derveer vs. *Delaware, L. & W. R. Co.,* (2nd Cir.) 84 F. (2d) 979;

Paster vs. *Penn. R. R.,* (2nd Cir.) 43 F. (2d) 908;

Great Northern Ry. Co. vs. *Wiles, Adm.,* 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732;

Miller vs. *Central R. Co. of N. J.,* (2nd Cir.) 58 Fed. (2d) 635;

Pere Marquette Ry. Co. vs. *Haskins* (6th Cir.), 62 Fed. (2d) 806;

Atchison T. & S. F. Ry. Co., vs. *Ballard,* (5th Cir.) 108 Fed. (2) 768;

Aetna Cas. & Surety Co. vs. *Yeatts* (4th Cir.) 122 Fed. (2d) 350.

2. The District Court should have granted appellant's motion to set aside the verdict and judgment. (Specification of Error No. 2.)

3. In the alternative the District Court should have granted appellant's motion for a new trial. (Specification of Error No. 2.)

4. The record is devoid of any evidence of negligence on the part of the appellant, its agents or employees, which could be said to have been a contributing cause to the death of the engineer. While the

case was submitted to the jury on presumably four separate acts of alleged negligence on the part of the appellant, in reality they boil down to two specific charges:

(1) Failure to provide deceased engineer with a safe place to work; and

(2) Violation of Operating Rules 99, 101 and 108. (Ex. 24.)

5. The District Court should have specifically instructed with reference to Rule 93 as requested in appellant's Requested Instruction No. 6. (Specification of Error No. 4.)

6. The District Court should have withdrawn from the jury's consideration the alleged failure of the appellant to furnish decedent with a safe place to work. (Specification of Error No. 5.)

7. The District Court should not have submitted for jury consideration the alleged violation by appellant of Rules 99, 101 and 108. (Specification of Error No. 6.)

8. The District Court should have sustained the objection of appellant's counsel to the introduction of the expert testimony given by appellee's witness Maury touching the application of Rules 99, 101 and 108. (Specification of Error No. 7.)

ARGUMENT

The appellee's action is barred by the negligence of the deceased which was the sole and efficient cause of his death. (Specifications of Error Nos. 1 and 2.)

As will be seen from appellant's Statement of the Case and Summary of Argument, the action in the main was based on two grounds:

(1) Failure to furnish deceased with a safe place to work; and

(2) Violation by appellant company of three operating rules of the company.

The appellant anticipates that appellee will contend there was an additional ground of negligence, viz: the failure of the dispatcher at East Lewiston, Idaho, to apprise the crew members of Extra No. 1648 that Extra No. 6015 was proceeding easterly towards Arrow Station, and to apprise the crew members of Extra No. 6015 that Extra No. 1648 had left ahead of that train. In this regard appellee's witness, David A. Livingstone, a brakeman on No. 1648, testified as follows:

> "Q. Mr. Livingstone, were you or were you not notified that Extra No. 6015 was proceeding easterly toward Arrow Station on November 11, 1951?
>
> A. No, we were not notified.

Q. By 'we', who do you mean?

A. The whole crew; none of the crew so far as I know.

Q. That was the crew of Engine No. 1648?

A. Yes." (R. 50-51.)

As to the failure to give notice to the crew members of No. 6015, appellee's witness, Frank A. Reisenbigler, fireman on that train, testified as follows:

"Q. When your crew left East Lewiston were you notified or any of your crew notified that Extra No. 1648 had left Lewiston for Arrow Station?

MR. McKEVITT: We object to that on the ground that there was no legal obligation on the part of the railroad to so notify them.

THE COURT: He may answer.

A. We received no notice that I recall.

Q. Was there a dispatcher at East Lewiston, a Northern Pacific dispatcher?

A. Yes.

Q. And if notice was given would that be imparted to the conductor, engineer and fireman?

A. Yes, sir." (R. 79.)

* * *

"Q. At any time before the collision with train No. 1648 had you or your crew been notified that No. 1648 was at Arrow Station, or ahead of you?

A. No.

Q. You had not?

A. No." (R. 80.)

As will be seen from the authorities heretofore cited and hereinafter quoted no such duty devolved upon the company, and even if it had, it did not absolve the deceased engineer from complying with Rule 93. Furthermore, the complaint contained no specific allegation of negligence in this regard, nor was there any operating rule of the company that required such notice to be given to crew members of extra trains.

As to the alleged failure of the appellant company to furnish the deceased with a safe place to work, suffice it to say that this could only refer to defective train equipment or right of way conditions. In this regard we respectfully request this Honorable Court to refer to subdivisions 2, 3, 4, 5, 6, 7, 8 and 9 of paragraph V of the complaint, all of which were withdrawn from jury consideration. There was no defect in operating equipment; there was no defect in roadbed, any or either of which was a contributing cause to the death of the engineer; in short, failure to furnish the deceased with a safe place to work was not

and could not have been an issue in this case despite the fact that the District Court submitted the same for jury determination.

This Honorable Court will observe that the Instructions given by the District Court were of a general nature. On the vital question as to what constituted *a safe place to work* no specific instruction was given; simply the statement that

> "An employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work, and that he may rely and act on this assumption."

When the District Court withdrew on appellant's request subdivisions 2, 3, 4, 5, 6, 7, 8 and 9 of paragraph V of the complaint, the issue that appellant had failed to furnish the deceased engineer with a safe place to work went out of the law suit. What then remained? Answer: One or possibly two questions for jury determination:

(a) Did appellant violate Rules 99, 101 and 108, and, if so, was such violation a contributing cause to the engineer's death?

(b) Was it required that the dispatcher at East Lewiston should have notified the respective members of the crews of No. 1648 and No. 6015 as to the relative locations of both trains at given times and given places?

Rules 99, 101 and 108 have already been set forth herein. It is quite apparent that these rules deal solely and alone with the operation of trains outside of yard limits. They are general operating rules as distinguished from specific operating rules. In this connection the attention of this Honorable Court is invited to the case of

> *Atchison, T. & S. F. Ry. Co.* vs. *Ballard,* (5th Cir.) 108 Fed. (2d) 768.

In the case referred to an engineer brought action for injuries sustained when his train collided with a standing train within yard limits. It was twice before the Fifth Circuit Court of Appeals. (First appeal, 100 Fed. (2d) 162; therein the Court said:

> "Rule 494 provides as to firemen: They must assist in keeping a constant lookout upon the track and must instantly give the engineman notice of any obstruction or signal they may perceive."

Appellant quotes the pertinent portions of the opinion on the second appeal (Hutcheson, Circuit Judge):

> "When this case was here before (100 Fed. (2d) 162) it was on an appeal from a judgment on a verdict directed against appellant then, appellee now, on the ground that the primary cause of the 'collision' was the negligence of plaintiff, in not operating his train at restricted speed, within the yard limits of the station at Hagerman.

> On this appeal, the railway company, assigning other grounds too, still insists that the verdict should have been directed for it on that ground. We thought then, that the case was not one for a direction. We thought then, that since, under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51 et seq., contributory negligence on the part of an employee, is not a bar to, but only diminishes recovery, the case was one for a jury verdict. Fully recognizing the laboring oar they pull, in endeavoring to have us reverse our former judgment, appellant yet vigorously maintains that: the case is one of an employee causing his own injury through direct violation of a positive, specific rule; and that within the authorities, his negligence must be considered the sole proximate cause of his injury, even though the fireman was negligent in failing to keep a proper lookout. (Citing cases.)"

Analyzing the position of the railway company, the learned Court went on to state that the case was one for a jury verdict

> "upon whether there was negligence of the fireman which concurred with that of the plaintiff (engineer) to cause the collision, we overruled appellant's assignment that a verdict should have been directed for it."

The *Atchison* case, however, is direct authority for the contention of appellant that the sole and efficient cause of the death of Engineer Mely was his violation of Rule 93. In reversing and remanding a judgment for the plaintiff, the Circuit Court of Appeals of the Fifth Circuit used the following language:

"We think appellant (railway company) is right. It is true that a violation of company rules for the conduct of its employees, general in terms, will not ordinarily constitute negligence as matter of law. Nor will observance of such rules, as matter of law, necessarily be due care, but it will be for the jury to say, considering the rules along with the evidence as a whole, whether there was negligence. (Citing cases.) A violation of specific rules, though, will constitute negligence just as their observance by others will, in relation to the violator, constitute due care. (Citing cases.) Thus, as applied to the question at issue, if the rule for keeping the train at restricted speed had stopped there, without more, it would have left the matter greatly one of judgment and it would be a question of fact under the opinion of witnesses qualified to give opinions, whether in the particular case there was negligence in failing to observe it. But where, as here, there is a precise definition of restricted speed, the question of what the rule means and requires is a question of law for the court, and the evidence of plaintiff himself showing that the train was not proceeding at restricted speed within the definition, it was the duty of the court to say so, and to instruct the jury; that plaintiff was himself negligent in violating the rule of restricted speed; and that if the jury believed that that violation was the sole proximate cause of the injury, they should find a verdict for defendant. But, because of the issue made on the negligence of the fireman it was also the duty of the court to instruct the jury that if, on the other hand, they believed that the fireman was also negligent in not keeping a proper lookout, or in not properly advising plaintiff of the obstruction on the track, and this negligence concurred with plaintiff's negligence, they should award plaintiff recovery but dimin-

ish the amount of it by such sum in proportion to the total injuries, as the negligence attributable to him bears to the negligence of the fireman.

Appellant, in charge after charge, requested the court to do this, and in addition, objected to the form of the general charge. This, instead of instructing directly upon the rule, as to restricted speed, its meaning and effect, that it had been violated, and that its violation was negligence, submitted to the jury, whether or not it had been violated, and whether, if it had been, the violation was negligent. Thus, there was error in submitting an issue as to the legal effect of the violation of this rule when it was the duty of the court to direct the jury, that its violation by plaintiff would be negligence. And there was error, too, in failing to instruct the jury that on the undisputed facts, plaintiff had violated it."

* * *

"A careful consideration of the evidence convinces us that the rule requiring an engineer to operate his train at restricted speed within yard limits, is, in the light of the definition in the rules not 'very indefinite', but most definite; that Rules 93 and D-153 are not in conflict with Rule 99, but complementary thereof. We think it quite plain, too, that within the authorities *Little Rock & M. R. Co. v. Barry,* 8 Cir., 84 F. 944, 43 L. R. A. 349; *Southern Ry v. Hylton,* 6 Cir., 37 F. 2d 843; they imposed a specific duty upon plaintiff to watch out for the train ahead, within the yard limits, and to so run his train, that he could stop it when necessary to avoid running into the train ahead. They imposed no duty on the train crew ahead to look out for him. Rules 93 and D-153, both state positively 'within yard limits, trains and engines may use the main

track, not protecting against second or third class trains or extra trains. * * * All except first class trains will move within yard limits at restricted speed. *The responsibility for accident with respect to second or third class trains rests with the approaching train.'* (Italics supplied.) Then the rule defined restricted speed—'*Proceed prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced.*' (Italics supplied.) A rule of similar purport covering movement of vessels in a fog, has been uniformly construed as premptory, its violation negligent, if a ship is at such speed as to be unable to stop within the distance other vessels can be seen. The Anna, 5 Cir., 297 F. 182, 184. Without any rule, the courts have held, that automobiles traveling where vision is obscured, must be kept at such speed as to be able to stop within the distance within which an obstruction may be seen. (Citing cases.)

Plaintiff's train was not a first class train but an extra. The rules were made to cover such trains as his. He knew that Extra 1146-East was ahead of him and he knew that because of the curve, he would not be able to see a train standing at the station until within 1,000 ft. of it. Knowing all of this, instead of bringing his train to restricted speed, and proceeding under it, he, according to his own testimony, merely reduced it from the 25 miles per hour, at which he was traveling, down to an estimated 12 to 15 miles per hour, a speed which according to his own testimony, would require 1,400 to 1,500 ft. to stop in. Assuming that plaintiff's testimony as to the rate of speed at which he was running was true (though it hardly seems reasonable that a train running at only 12 to 15 miles per hour, could not be stopped by the application of the emergency, under 1,500 ft.), we think it is contrary to

common sense to contend that the train when running in yard limits at a speed which requires 1,500 ft., merely a third of a mile to stop in, was running at restricted speed under the rule. A verdict that it was, would we think, be wholly without support in the evidence."

* * *

"We think it quite plain too, that Rules 93-99, are not in conflict with, but are complementary of each other. Rule 99 is general, Rule 93 is particular. Rule 99 applies to every case except that dealt with in Rules 93 and D-153. Those rules control special cases. It was not necessary, therefore, for the crew of 1146-East, to put out signals, look out for or otherwise protect against Extra 1146, within the yard limits of Hagerman. The case did not come under Rule 99 providing: 'When a train stops under circumstances in which it may be overtaken by another train', for under Rule 93 and D-153, there were no circumstances under which 1146-East might be overtaken by Extra S-41. The responsibility for avoiding a collision was on plaintiff's train and not on 1146-East. Its crew was expressly excused from protecting against the following train. It was error to submit the question of the negligence of its members to the jury."

It will be observed that Rules 93 and D-153, referred to in the foregoing opinion, are substantially the same, if not identical with Rule 93, and the definition of restricted speed, of the Operating Rules of the appellant railway company heretofore set out.

Were it not for the fact that the evidence in the *Atchison* case, *supra,* disclosed that the fireman on

the train involved had violated an operating rule of the company, unquestionably the Court of Appeals in that case would have held that the violation by the engineer of the restricted speed rule was the sole and efficient cause of his injury.

In the case at bar there is an utter absence of proof that any operating rule promulgated for the protection of Engineer Mely was violated by the appellant, its agents or employees.

It will be kept in mind that Rules 99, 101 and 108, the alleged violations of which were heavily relied upon by appellee, had no application to trains being operated *within yard limits*. This is established in the cross examination of appellee's so-called expert witness Maury:

> "Q. Now, Mr. Maury, will you turn to page 44 of the rule book—do you have the page?
>
> A. Yes, sir.
>
> Q. It is your understanding, is it not, that this unfortunate collision occurred within yard limits?
>
> A. Yes, sir. (R. 158.)
>
> Q. What, as an experienced conductor—brakeman and conductor—is meant by yard limits?
>
> A. It means that a train working inside of those limits does not have to protect against other trains.

Q. And when you say a train working within yard limits does not have to protect against other trains, you are referring, are you not, to train No. 1648, Eddie Feehan's train?

A. That's right.

Q. And you are referring to the fact that it was not incumbent upon him, under the rules, to protect his train against extra No. 6015, isn't that right?

A. In a way, yes.

Q. Totally yes. Now, will you kindly read rule 93?

A. 'Within yard limits the main track may be used clearing first class trains when due to leave the last station where time is shown. In case of failure to clear the main track, protection must be given as prescribed by rule 99. Within yard limits the main track may be used without protecting against second or inferior class, extra trains and engines.'

Q. Just a moment, stop there. 'Within yard limits the main track may be used without protecting against second and inferior class, extra trains and engines.' That rule was in effect November 11, 1951, was it not?

A. Yes, sir.

Q. Both of these trains were within the yard limits, as you know?

A. Yes. (R. 159.)

Q. What is meant by the language 'against extra trains'?

A. 'Protection against extra trains' or 'without protecting against extra trains' means that you don't have to have a flagman out.

Q. That means that it was not the duty of Eddie Feehan to send any brakeman back to put out a fusee, or a flare or a torpedo on the day in question?

A. That's right." (R. 160.)

* * *

"Q. Now, just assume that you were similarly placed, as was Eddie Feehan—by the way, do you know that that train was about to move out of Arrow, that the air was cut in, the Engineer was in the cab and they were about to depart?

A. That is what I heard.

Q. Assuming that you were in charge of the train, such as Eddie Feehan was, under those conditions, as a conductor on the P & L branch, during the time that you say you operated, did you ever do what you have just described as sometimes done, at Arrow?

A. Not at Arrow. (R. 161.)

Q. No; now will you read the following paragraph on page 44, the fourth paragraph? No, it is paragraph 3.

A. 'Within yard limits second and inferior class, extra trains and engines must move at restricted speed.'

Q. Within yard limits second and inferior class, extra trains and engines must move at restricted speed. What train was controlled—what Engi-

neer was governed by that Rule on November 11, 1951, in connection with this accident?

A. Both engineers on both trains.

Q. Did that rule govern and control Engineer Mely?

A. Yes, sir." (R. 162.)

* * *

"Q. Under the rules, then, that were in effect on that date, the engineer sees that warning sign, and knowing that there is a yard limit board further to the east, there is some duty devolved upon him, is there not?

A. Yes, sir.

Q. What duty was there on that date on Engineer Mely?

A. I would say to be alert.

Q. You say to be alert, that is one thing—is that all; that means just to look and see, and be able to see what is going on? In addition to being alert what else is he called upon to do, if anything? Maybe I can refresh your recollection by repeating: 'Within yard limits second and inferior class, extra trains and engines must move at restricted speed'?

A. Oh, yes, of course, that is up to his judgment.

Q. In other words, it is up to him to determine whether or not he is moving at restricted speed?

A. That's right.

Q. Kindly turn to, under the heading 'definitions' in the rule book on page 8?

A. Yes, I have it.

Q. Do you see a heading there, 'restricted speed'?

A. Yes, sir.

Q. Will you kindly read that to the Court and jury?

A. 'Proceed prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced.' (R. 163.)

Q. 'Proceed prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced.' That rule controlled Engineer Mely on that date, did it not?

A. I would say so; yes.

Q. And if it was necessary to reduce the speed to ten miles an hour, under that rule, he was required to do it, was he not?

A. Yes, sir.

Q. In other words, under that rule, is it not a fact that it was Engineer Mely's duty to have that train under such control that when he applied the brakes he could stop short of the rear end of the caboose into which his engine crashed —that was his duty, wasn't it?

A. Yes.

Q. In other words, is it not a fact that the warning Board is an extra caution to him? When he hits that sign it warns that at a further distance east is the yard limit board, then he should begin to get his train under absolute control, shouldn't he, before entering the yard limits.

A. Yes, sir; I would say so.

Q. You have referred to rule 99, and his Honor has read it and it has been read; now, isn't it a fact, Mr. Maury, that that rule refers to train operation outside of the yard limits?

A. That isn't what it says in the book Mr. McKevitt.

MR. McKEVITT: Will you read the question, Mr. Reporter? (R. 164.)

Q. Now, that can be answered 'yes' or 'no'.

A. No, it doesn't. I never realized I answered like that.

Q. Is it your testimony that that rule refers to trains within the yard limits and also without the yard limits?

A. Under certain circumstances, yes sir.

Q. Circumstances that are referred to there where the language is used, 'When a train stops under circumstances in which it may be overtaken by another train' means this, does it not—you are familiar with the fact that when you leave this bridge there is an area in here where there is no yard limit, is that right?

A. Yes.

Q. The circumstances that are referred to in that rule are these: That if Eddie Feehan's train for some reason or other had stalled in this area outside of yard limits—those are the circumstances that would require him to go back and protect against No. 6015, that's true, isn't it?

A. Yes. What I mean, Mr. McKevitt, it doesn't refer to yard limits in Rule 99.

Q. That's exactly what I am talking about. Rule 99 does not refer to yard limits, does it?

A. It just says any place.

Q. What I am asking you, you have one rule that is a yard limit rule, don't you?

A. Yes, sir.

Q. That is 93?

A. Yes.

Q. Then you have 99?

A. Yes, sir.

Q. You know, Mr. Maury, that 99 doesn't refer to yard limits because you have a separate yard limit rule; you know that, don't you?

A. Yes, sir.

Q. Isn't it a further fact that rule 99 only requires you to flag against first class trains within yard limits?

A. That's right, sir.

Q. And No. 6015 and No. 1648 were not first class trains, we are agreed on that?

A. That's right." (R. 166.)

In *Miller* vs. *Central R. Co. of N. J.,* (2nd Cir.), 58 Fed. (2nd) 635, it is said:

"Nor are those decisions in point which hold that the crews of an 'inferior' train are not entitled to information of the whereabouts of others that they may meet. *Rosney v. Erie R. Co.,* 135 Fed. 311 (C. C. A. 2); *Great North. R. v. Hooker,* 170 Fed. 154 (C. C. A. 8); *Chicago R. I. & P. Ry. Co. v. Ship,* 174 Fed. 353 (C. C. A. 8); *Central R. Co. of New Jersey v. Young* (C. C. A. 3) 200 Fed. 359, L. R. A. 1916E, 927. These involved yards where such information is impracticable and probably worse than idle."

In *Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224

the Supreme Court of the United States, speaking through Mr. Justice Holmes, reversed a decision of the Court of Appeals of New York in favor of a conductor in charge of a train who was killed in a head-on collision. The action was under the Federal Employers' Liability Act and the only question presented to the Supreme Court of the United States was whether the death resulted, in whole or in part from the negligence of any of the employees of the carrier,

within the meaning of the act. The pertinent portion of the opinion is as follows:

> "Caldine was conductor of train No. 2 upon a single track that passed through Bridgewater. He had printed orders that his train was to pass train No. 15 in Bridgewater yard, and that train No. 15 was to take a siding there to allow No. 2 to pass. The order was permanent unless countermanded in writing by the superintendent. Its purpose to prevent a collision was obvious, and there was no excuse for not obeying it. But this time, after reaching Bridgewater, instead of waiting there as his orders required him to do, Caldine directed his train to go on. The consequence was that at a short distance beyond the proper stopping place his train ran into train No. 15, rightly coming the other way, and he was killed. The facts relied upon to show that the collision was due in part to the negligence of other employees are these: The conductor of No. 15 generally, or when he was a little late in arriving at a station about 2 miles from Bridgewater, would telephone to the station agent at Bridgewater that he was coming. He did so on the day of the collision. The station agent who received the message testified that he told the motorman of No. 2, but the motorman denied it. At all events the deceased, the conductor of No. 2, did not receive the notice. It is argued that the failure to inform the conductor, and the act of the motorman in obeying the conductor's order to start, if, as the jury might have found, he knew that train No. 15 was on the way, were negligence to which the injury was due at least in part. It is said that the motorman should have refused to obey the conductor, and should have conformed to the rule, and that his act in physically starting the car was even more immediately connected with the colli-

sion than the order of the deceased. The phrase of the statute, 'resulting in whole or in part', admits of some latitude of interpretation and is likely to be given somewhat different meanings by different readers. Certainly the relation between the parties is to be taken into account. It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the railroad company that employed him to say that the collision was due to anyone but himself. He was in command. He expected to be obeyed, and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts. See *Davis v. Kennedy*, 266 U. S. 147, 69 L. ed. 212, 45 Sup. Ct. Rep. 33.

Still considering the case as between the petitioner and Caldine, it seems to us even less possible to say that the collision resulted in part from the failure to inform Caldine of the telephone from train No. 15. A failure to stop a man from doing what he knows that he ought not to do hardly can be called a cause of his act. Caldine had a plain duty, and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey."

St. Louis Southwestern Ry. Co. vs. Simpson, 286 U. S. 346, 52 S. Ct. 520, 76 L. Ed. 1152, an action under the Federal Employers' Liability Act, a railroad engineer disregarded a train order to remain on a siding

until another train had passed, in consequence of which the trains collided head-on. His administratrix relied on the Last Clear Chance Doctrine. The Supreme Court, speaking through Mr. Justice Cardozo, said:

> "The facts so summarized are insufficient to relieve the engineer from the sole responsibility for the casualty that resulted in his death. What was said by this court in *Davis v. Kennedy,* 266 U. S. 147, 69 L. ed. 212, 45 S. Ct. 33, might have been written of this case. 'It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more.' See also *Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, 73 L. ed. 224, 49 S. Ct. 91; *Frese v. Chicago, B. & Q. R. Co.,* 263 U. S. 1, 3, 68 L. ed. 131, 132, 44 S. Ct. 1; *Great Northern R. Co. v. Wiles,* 240 U. S. 444, 448, 60 L. ed. 732, 734, 36 S. Ct. 406."

The case of *Van Derveer vs. Delaware, L. & W. R. Co.,* (2nd Cir.) 84 Fed. (2d) 979, was an action for wrongful death under the Federal Employers' Liability Act. The deceased conductor was killed when a freight car on which he was riding during switching operations was side-swiped by a locomotive on an adjoining track after the freight conductor had changed

two switches lined up for the movement of the locomotive and cars on the adjoining track, in violation of a railroad rule. In affirming a judgment dismissing the complaint entered on the direction of a verdict at the close of the evidence, L. Hand, Circuit Judge, speaking for the Court, said:

> "The plaintiff insists that there was a question of fact about the meaning of the rule; that is, that the jury might have found that Train No. 52 had 'stopped.' But the meaning is perfectly plain; it is that unless the movement for which the switches have been 'lined-up' shall be over, so that that 'line-up' will not be needed any more, they shall not be touched without consent. That is so plainly the common-sense of the matter that no jury should be allowed to find otherwise. We do not indeed find in the record explicit testimony that Van Derveer knew that the locomotive was to drop the rear nineteen cars and go back to 'Running Track No. 1'. But the fact was so and for that reason he could not have 'made sure' of the contrary. Besides, the operation was plainly drilling in the yard and the locomotive would normally go back to the thirty-five cars on the running track. Indeed the plaintiff has not argued otherwise. Therefore the only question is whether Van Derveer's breach of the rule bars the action.
>
> When an injury to one employee results from the combined fault of himself and a fellow-worker, the damages are divided (section 53, title 45, U. S. Code (45 U. S. C. A., Sec. 53)); but an exception has grown up when the injured employee's fault is the violation of a rule or an express instruction. *Great Northern R. Co. v. Wiles,*

240 U. S. 444, 36 S. Ct. 406, 60 L. ed. 732, is scarcely an instance, though sometimes cited as such. It is better classed as a case where the injured person, having before him the consequences of another's fault, does not do what he can to avoid them. The exception first appeared, so far as we can find, in *Frese v. Chicago B. & Q. R. Co.,* 263 U. S. 1, 44 S. Ct. 1, 68 L. ed. 131, where a locomotive driver failed to stop his train at a crossing, as required by a rule of the road. He was of course on the right side of his cab and his fireman was on the left, whence came the colliding train; the court seemed to think it doubtful whether the fireman had kept a bad lookout, but went on to say that since the duty was primarily the driver's, it was irrelevant whether he had or not. It has at times been questioned whether the decision should not be limited to situations where the injured person is the superior of the other employee on whose fault he must rely to recover.

That would explain not only *Frese v. Chicago, B. & Q. R. Co.,* supra, but *Unadilla Valley Ry Co. v. Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. ed. 224, because the deceased conductor directed the driver to go on, contrary to the rule. True, the dispatcher was also negligent in that case in failing to tell the conductor that the train with which he collided was approaching, but the court said that the message would have merely given the conductor another motive to obey the rule. It is a little hard to see why that might not have been enough to have induced obedience, but if the contrary was intended, the decision is consistent with the supposed gloss. When the same accident was before us in *Unadilla Valley Ry. Co. v. Dibble,* 31 F. (2d) 239, we applied the doctrine to the driver whom the conductor had directed to break

the rule; and that was plainly wrong if the doctrine is limited as suggested. In *Davis v. Kennedy,* 266 U. S. 147, 45 S. Ct. 33, 69 L. ed. 212, it did not appear that the negligent fellow workers were under the driver's authority, and almost certainly they were not; therefore it also seems contrary to the limitation. The Sixth Circuit held the same thing in *Southern Ry. Co. v Hylton* (C. C. A.) 37 F. (2d) 843, and we did so again in *Paster v. Pennsylvania R. R.,* 43 F. (2d) 908. *Southern Ry. Co. v Youngblood,* 286 U. S. 313, 52 S. Ct. 518, 76 L. Ed. 1124, turned upon the absence of any other negligence than the deceased's. In *Rocco v. Lehigh Valley R. Co.,* 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743, the deceased had failed to ask the position of a train that he was to meet as required by a rule, though had he learned where it was he might rightfully have gone on to meet it. This fault was treated as only an element in determining his general negligence; but if the rule had directed him to wait where he was, Roberts, J. says (288 U. S. 275, at page 279, 53 S. Ct. 343, 77 L. Ed. 743), that the action would have failed. Thus there is no such gloss as that we have been discussing, and the doctrine is merely that if the injured employee has contributed to his injury by the breach of a rule or an instruction ad hoc, he cannot recover. By reason of the phrase, 'Contributory negligence,' in section 53 (45 U. S. C. A.), it might have been possible to put such an exception on the ground that indiscipline is not 'negligence', a word more properly confined to inattention to one's safety. But that has never been suggested as the reason, and we should hesitate to ascribe it to the court. Moreover, it is not in any case our province to do more than ascertain the extent of the doctrine. We are satisfied that it speaks generally, what-

> ever the reason, and that the judge was right to direct a verdict. Judgment affirmed."

Appellant has not quoted from all of the cases heretofore cited since it does not wish to unduly lengthen this brief; suffice it to say, however, that all involve specific rule violations.

Concluding this portion of the argument, appellant states categorically that counsel for appellee, under the record in this case, will be unable to point to one single act of negligence on the part of appellant which could be said to have contributed, in whole or in part, to the death of Engineer Mely.

ARGUMENT IN SUPPORT OF MOTION FOR NEW TRIAL

SPECIFICATION OF ERROR NO. 2

In the several grounds urged in its motion for a new trial appellant asserted that the verdict and judgment were contrary to the weight of the evidence; that there was no substantial evidence that the defendant was guilty of negligence, which negligence, in whole or in part, contributed to the death of appellee's husband.

The motion to set aside the verdict and grant a new trial is addressed to the discretion of the trial Judge and should be granted even though there be substan-

tial evidence supporting the verdict if, in his opinion, the ends of justice so require.

Aetna Cas. & Surety Co. vs. Yeatts, (4th Cir.) 122 Fed. (2d) 350.

SPECIFICATION OF ERROR NO. 4

That the District Court should have specifically instructed the jury in accordance with defendant's Requested Instruction No. 6 is borne out by the following language in *Atchison, T. & S. F. Ry. Co. vs. Ballard,* 108 Fed. (2d) 768:

> "A violation of specific rules though, will constitute negligence just as their observance by others will, in relation to the violator, constitute, due care. * * * But where, as here, there is a precise definition of restricted speed, the question of what the rule means and requires is a question of law for the court, and the evidence of plaintiff himself showing that the train was not proceeding at restricted speed within the definition, it was the duty of the court to say so, and to instruct the jury; that plaintiff was himself negligent in violating the rule of restricted speed; and that if the jury believed that that violation was the sole proximate cause of the injury, they should find a verdict for defendant.
> * * *
>
> "Appellant, in charge after charge, requested the court to do this, and in addition, objected to the form of the general charge. This, instead of instructing directly upon the rule, as to restricted speed, its meaning and effect, that it had been violated, and that its violation was negligence,

submitted to the jury whether or not it had been violated, and whether, if it had been, the violation was negligent. Thus, there was error in submitting an issue as to the legal effect of the violation of this rule when it was the duty of the court to direct the jury that its violation by plaintiff would be negligence. And there was error, too, in failing to instruct the jury that on the undisputed facts plaintiff had violated it."

SPECIFICATION OF ERROR NO. 5

The submission to the jury of the question of the alleged failure on the part of appellant to furnish the engineer with a safe place to work was not justified by the evidence. Since there was no defect in the mechanical equipment nor in the roadbed, the engineer had been furnished with a safe place in which to work.

SPECIFICATION OF ERROR NO. 6

The alleged violation of Operating Rules 99, 101 and 108 should not have been submitted to the jury. These rules refer to operation of trains outside of yard limits. This is borne out by a reading of the rules themselves as contrasted with Rule 93 and likewise by the testimony of plaintiff's so-called expert, Maury, hereinbefore quoted.

This contention finds support in the following language from the *Atchison* case:

"We think it quite plain, too, that Rules 93-99, are not in conflict with, but are complementary of, each other. Rule 99 is general, Rule 93 is particular. Rule 99 applies to every case except that dealt with in Rules 93 and D-153. Those rules control special cases. It was not necessary, therefore, for the crew of 1146-East, to put out signals, look out for or otherwise protect against Extra 1146, within the yard limits of Hagerman. The case did not come under Rule 99, providing: 'When a train stops under circumstances in which it may be overtaken by another train,' for under Rule 93 and D-153, there were no circumstances under which 1146-East might be overtaken by Extra S-41. The responsibility for avoiding a collision was on plaintiff's train and not on 1146-East. Its crew was expressly excused from protecting against the following train. It was error to submit the question of the negligence of its members to the jury."

Rules 93 and 99 above referred to are substantially similar if not identical with Rules 93 and 99 in the case at Bar.

SPECIFICATION OF ERROR NO. 7

The Court should have sustained appellant's objection to the introduction of expert testimony through the witness, Maury, touching the meaning and application of the several operating rules in question. These rules were not in conflict; they were clear and unambiguous. In this connection we again refer to the *Atchison* case:

"A careful consideration of the evidence con-

vinces us that the rule requiring an engineer to operate his train at restricted speed within yard limits is, in the light of the definition in the rules not 'very indefinite,' but most definite; that Rules 93 and D-153 are not in conflict with Rule 99, but complementary thereof. We think it quite plain, too, that within the authorities, *Little Rock & M. R. Co., v. Barry,* 8 Cir., 84 Fed. 944, 43 L. R. A. 349; *Southern Ry. v. Hylton,* 6 Cir., 37 F. 2d, 843; they imposed a specific duty upon plaintiff to watch out for the train ahead, within the yard limits, and to so run his train that he could stop it when necessary to avoid running into the train ahead. They imposed no duty on the train crew ahead to look out for him."

CONCLUSION

But one conclusion can be drawn from the undisputed evidence and from the uncontroverted physical facts disclosed by the record, viz: that the death of Engineer Mely was due solely and alone to his violation of Rule 93. In any event, appellant assuredly is entitled to a new trial for the reasons hereinbefore stated.

Dated at Spokane, Washington, this 8th day of January, 1954.

Respectfully submitted,

CANNON, MCKEVITT & FRASER

VERNOR R. CLEMENTS

Attorneys for Appellant.

No. 14,037

United States Court of Appeals
Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Appellant,*

vs.

TILLIE MELY, as Administratrix of the Estate of A. E. Mely, Deceased, *Appellee.*

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Idaho. Central Division.

HONORABLE CHASE A. CLARK,
United States District Judge.

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BRIEF OF APPELLEE

FACTUAL OUTLINE

The collision which gave rise to this action for damages occurred at the hour of 11:30 A. M. on November 11, 1951, on the Spokane-East Lewiston Division of the Northern Pacific Railway about three-fourths of a mile west from the Station of Arrow, Idaho, between a train known as "Extra 6015 East," consisting of a four unit diesel, with 15 cars attached, and a train known as "Extra 1648 East," consisting of an engine with 86 cars attached. Neither train was operating on a regularly prescribed schedule, but train 6015 East was then being operated under special train orders issued by the train dispatcher located at East Lewiston, Idaho. (R. 80.)

The evidence shows without conflict that train 6015 East was started from East Lewiston, Idaho, under train orders reading:

> "Engine N. P. 6015 run extra, East Lewiston to Arrow, will not register at Spalding, number 661 has passed Spalding." (R. 80.)

The train order made no mention of train 1648 East, and the crew of train 6015 East proceeded under said train order without any knowledge on the part of the crew members that train 1648 East was ahead on the same track (R. 80) and without any knowledge on the part of the crew members of train 1648 East that train 6015 East was following. (R. 51.) Such is the undisputed evidence in this case.

It is alleged in the complaint (R. 5), and admitted in the answer (R. 10), that A. E. Mely was the engineer of defendant's engine No. 6015 East, which collided with a train of cars being hauled by defendant's engine No. 1648 East. Both engines left East Lewiston, Idaho on the morning of the 11th of November, 1951, engine 1648 East at 9:15 or 9:20 A. M. (R. 39); engine 6015 East left East Lewiston, Idaho at 10:35 A. M. (R. 41), both headed in the same direction on a single track railroad, —(track shown in photographs). None of the crew members of either train knew of the presence of the other train upon this single track (R. 50-51)-(R. 80). The dispatcher at East Lewiston delivered the train orders to the crew of train 6015 East without notifying any of the crew members that train 1648 East was ahead (R. 80).

At the time engine 6015 East pulled out of East Lewiston, 10:35 A. M. (R. 41), engine 1648 had not arrived at Arrow Station, and did not arrive there until 10:40 or 10:45 A. M., (R. 41). There was a dispatcher at East Lewiston (R. 79) and a station agent at Arrow Station (R. 47), who could have phoned and determined that train 6015 East was running extra to Arrow Station. (R. 167-168.) The collision occurred at 11:10 A. M., (R. 45). Train No. 661, mentioned in the train order, was west bound. (R. 80.)

The box cars on the South siding at Arrow Station were observed by Mely's crew on the day previous to the collision (R. 88), and they were in the same position, on the siding, on the day of the accident (R. 88). The rear of the West box car on the South siding was 346 feet west of the rear of the caboose at rest on the main line. (R. 36.) There were fifty or sixty logging cars at the rear of the standing train No. 1648 East (R. 44) which were only 3½ feet in height, or about as high as an ordinary flat car (R. 44). There were no block signals on this track. (R. 51), (R. 81.)

The photographs in evidence show that there were two sharp 'S' curves west of the caboose of train 1648 East which impaired the vision of an approaching engineer, such as engineer Mely, of the main track or objects thereon, as likewise did the brush and trees that were growing alongside the side track. There being no block signals (R. 81), the crew of 6015 depended solely on their senses of sight and hearing to determine obstructions ahead. The logging cars were obscured by the box cars on

the South siding (R. 86), and the caboose of train 1648 was not as high as the box cars on the South siding. (R. 139.) In answer to a hypothetical question (R. 141-142), Merle C. Myhre (misspelled Maury in transcript), stated that Rule 108 and Rule 99 here govern the situation presented (R. 148-149), and also Rule 101 (R. 152). Witness Myhre explained the circumstances under which Rule 99 applied (R. 167).

The caboose of train 1648 was 603 feet east of the West switch (R. 195), and the first curve 42 feet west of the West switch (R. 194). Appellant's witness testified Mely's train could have been stopped between 700 and 800 feet if going at 30 miles an hour (R. 228-229), but the evidence shows that Mely had only 645 feet of straight track in which to stop his train. In making the test run, appellant's witness said:

> "A. The caboose was on the side track when the test run was made.
> Q. Why was the position changed,
> A. Well, to avoid a second accident in case they could not get stopped in the distance they neeeded—they did not want another accident." (R. 192.)

Mely's train left North Lapwai at 11:04 A. M., (R. 196), the collision occurred at 11:10 A. M. (R. 196). The distance from North Lapwai to the caboose of train 1648 is 3.1 miles (R. 194). It took engineer Mely six minutes to travel 3.1 miles, or an average speed of about thirty miles per hour. He was not traveling within yard limits the full route, and, therefore, may have exceeded a speed of thirty miles per hour outside yard limits.

A. E. Mely's average earnings for three years previous to his death amounted to an average monthly wage of $537.61 (R. 128). His expectancy of life 17.4 years (R. 36). His widow's expectancy of life 20.2 years (R. 36), and her pecuniary loss by reason of the death of her husband amounted to $150.00 or $170.00 per month (R. 128). There were no children.

COMMENT ON APPELLANT'S STATEMENT OF CASE.

On page 5 of appellant's brief it is asserted that certain material facts are undisputed. We draw to the Court's attention the fact that there is a dispute as to whether or not train number 6015 was being operated at restricted speed prior to the collision, and this regardless of the speed tape on engine number 6015. The fireman of engine 6015, Frank A. Reisenbigler, testified as follows:

> "Q. Was there anything unusual in the speed of that train that drew your attention to the speed?
> A. No, sir." (R. 79.)

The brakeman of train 6015, A. G. Ferris, testified as follows:

> "Q. Was there anything unusual in the speed of the train that you noticed?
> A. Not that I noticed, or was conscious of, no, sir." (R. 106.)

OPERATING RULES AND GENERAL INSTRUCTIONS

(Ex. 24; R. 154.)

According to the rule book, Ex. 24, on page 6, under the heading "definition," appears the following:

> "Train of superior right—a train given precedence by a train order." (Ex. 24, p. 6.)

RULE "S"—71, reads as follows:

> "S-71: A train is superior to another train by *right*, class or direction.
>
> Right is conferred by *train order;* class and direction by time-table.
>
> *Right* is superior to class or direction.
>
> Direction is superior as between trains of the same class." (Ex. 24, page 39.)

The train order and the operating rules relied upon by appellant are not dissimilar from those construed in Chicago, R. I. & P. R. Co. v. Wright, 239 U. S. 548, 36 S. Court, 185; 60 L. Ed. 431, wherein the reasonableness of the rules was submitted to the jury as a question of fact, and the same is true of the following rules involved in Southern Ry. Co. v. Craig (4 Cir.), 113 Fed. 76.

The Court fully charged on the operating rules introduced in evidence, and other general rules read to the jury by counsel, and without objection permitted the jury to take the rule book with them to the jury room (R. 247-248). Rule 995 reads as follows:

> "RULE 995: Train dispatchers will issue train orders, and will transmit and record them as prescribed by the rules * * *." (Ex. 24, page 212.)

Rule 997 reads as follows:

> "RULE 997: Train dispatchers must guard against dangerous conditions in train movements and improper or unsafe combinations in train orders." (Ex. 24, page 212.)

The complaint (R. 7) charged negligence in failure to give engineer Mely any warning of the danger ahead. The train order was an express direction for him to proceed to Arrow Station and surely caused Mely to rely upon the implied assurance that, except for opposing train 661, no other train was on the track. Mely's operation was in obedience to the train order, and the jury undoubtedly found him justified in assuming a 'clear track ahead' with the superior right to run straight through to Arrow Station. Thus, the dispatcher's train order might be considered as a fault; it certainly contributed to the collision. Miller v. Central R. Co. of New Jersey (2nd Cir.) 58 Fed. (2d) 635, 636.

We do not believe this conclusion to be at variance with the language used by this Court in Atchison, T. & S. F. Ry Co., v. Seamas (9th Cir.) 201 F. (2d), 140, where distinction is drawn between negligent conduct and contributory negligence in regard the right of an employee to assume that the master has used ordinary care for the employee's safety. The jury could consider that defendant was negligent when its dispatcher sent both crews in the same direction on a single track without telling them specifically of the presence of the other. Williams v. Reading Co., 99 Fed. Supp. 960, 962.

PREFACE.

"Every event is the result of prior causes and itself the cause of future events."

Beyond the High Himalayas, p. 153,
By Justice William O. Douglas.

APPELLATE REVIEW.

"The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact-finding body. It weighs contradictory evidence and inferences, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29; 64 S. Ct. 409, 88 L. Ed. 520.

In actions under the Federal Employers' Liability Act, "once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for the Appellate Court to draw contrary inferences, or to conclude that a different conclusion would be more reasonable."

Ellis v. Union Pac. R. Co., 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572.

Although Rule 61 of the Federal Rules of Civil Procedure is intended primarily for the guidance of the trial

court, it seems to be the consensus of opinion that this particular rule should be heeded by the Court of Appeals, so as to make it effective. We cite the following cases adhering to this principle:

> Gillis vs. Keystone Mut. Cas. Co., C. A. Ky., 1949, 172 Fed. (2d) 826; certiorari denied, 70 S. Ct. 67, 338 U. S. 822, 94 L. Ed. 499.

See also,

> DeSanta vs. Nehi Corp., C. A., N. Y., 1948, 171 F. (2d) 696;
>
> University City vs. Home Fire & Marine Ins. Co., C. C. A., Mo., 1940, 114 F. (2d) 288.

We quote Rule 61:

> "RULE 61, HARMLESS ERROR.
>
> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceeding must diregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

COMPARATIVE NEGLIGENCE RULE.

The Court, in Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610 explained the Assumption of Risk and contributory negligence doctrine as applied to the 'primary duty rule' in which *contributory negligence through violation of a company rule*, became assumption of risk, when it said on the question of proximate cause: "In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances: or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation or doing what such a person under the existing circumstances would not have done." Congress swept into discard with the adoption of the 1939 amendment to the Act the employee's burden from assumption of risk by whatever name it may be called, and the adoption of this amendment did "establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned." This learned opinion demonstrates the fact that even before the 1939 amendment, violation of a company rule amounted only to contributory negligence but became, through judicial interpretation, assumption of risk sufficient to bar the action. Since the assumption of risk doctrine no longer applies, nothing remains but questions of negligence and contributory negligence in actions under this particular Act.

STATUTORY LAW.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. * * *." 45 U. S. C. A., 51.

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U. S. C. A., 53.

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U. S. C. A., 54.

ARGUMENT.

We have carefully checked the cases cited by appellant in support of a reversal of the judgment in this case, and we state affirmatively to this Court that in appellant's table of cases there is not one case cited that was not decided prior to the 1939 amendment to the Federal Employer's Liability Act, 45 U. S. C. A. 51, et seq., or when the event occurred after the passage of the 1939 amendment. Every case cited by appellant dealing with the Federal Employer's Liability Act has application to the "primary duty rule" in which contributory negligence through violation of a company rule or specific order became assumption of risk, and are the type of cases which were swept into discard with the adoption of the 1939 amendment to the Federal Employer's Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444; 87 Law Ed. 610.

In the decision of the Court of Appeals, Tiller v. Atlantic Coast Line R. Co., (4th Cir.) 128 Fed. (2d) 420, the Court rejected the argument that since the doctrine of assumption of risk had ben abolished, the carrier could no longer interpose it as a shield against the consequences of its negilgence. The injured employee contended that by reason of the amendment the carrier could no longer rely upon a company rule to defeat his action under the guise that the employee had assumed the risk, "in failing to be on the lookout for his own safety so long as the train movement was not unusual." On appeal to the Supreme Court of the United States, Tiller vs. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, the Court rejected all cases decided before the 1939 amendment which dealt with assumption of risk through violation of Company rules, and the Court said:

> "We hold that every vestige of the Doctrine of Assumption of Risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'."

Further in the same case, and after analyzing the application of the "primary duty rule," "promise to repair," "simple tool" and "peremptory order" concepts into the assumption of risk doctrine, the Court said:

> "The adoption of this proposed amendment will, in cases in which no recovery is now allowed, establish the principle of comparative negligence which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the

> employer, and, in the light of the comparison, do justice to all concerned."

And in the closing paragraphs of that decision, the Court held:

> "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as well as others,"

Or, as we have put it on another occasion,

> "Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences, the case should go to the jury."

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610.

Section one of the Act makes the carrier liable in damages for injury or death "resulting in whole or in part from the negligence" of any of its "officers, agents, or employees." The rights which the Act creates are Federal rights protected by Federal, rather than local rules of law, and those Federal rules have been largely fashioned from the common law, except as Congress has written into the Act different standards.

Bailey v. Central Vermont R. Co., 319 U. S. 350; 63 S. Ct. 1062; 87 L. Ed. 1444.

NEGLIGENCE.

Liability imposed by the Federal Employer's Liability Act is for negligence of any officer, agent, or employee of the carrier, or for any defect or insufficiency, due to the carrier's negligence in its appliances, road-bed, or other equipment, and is to be determined by the general rule, which defines negligence as the lack of due care under the circumstances, or the failure to do what a reasonable and prudent person would ordinarily have done under the same or similar circumstances, or doing what such a person under the same or similar circumstances would not have done. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54; 63 S. Ct., 444, 87 L. Ed. 610.

The railroad maintained no automatic block signal system on this particular track (R. 81. Conceding that the railroad was not negligent in failing to provide a block signal system, this fact alone would not prevent the jury from holding the railroad to a greater degree of caution than if the system was blocked. To subject an employee, without warning, to unusual dangers not normally incident to the employment, is itself an act of negligence, and the jury could hold the employer liable by viewing its conduct as a whole, especially, as here, where the elements indicating negligence are closely interwoven and where each imparts character to the other. Knowledge of danger may be essential in an unblocked track system while unnecessary if the system is blocked, and the employee has a right to assume that the employer has exercised proper care with respect to providing him a reasonably safe place to work, and this includes care in establishing

a reasonably safe system or method of work. The standard of care is measured by the dangers of the business, and must be commensurate therewith. The greater the danger the higher the care.

Blair v. B. & O. R. Co., 323 U. S. 600, 65 S. Ct. 545; 89 L. Ed. 490;

Wilkerson v. McCarthy, 336 U. S. 53; 69 S. Ct. 413, 93 L. Ed. 497;

Chesapeake & Ohio Ry. Co. v. Proffitt, 241 U. S. 462, 36 S. Ct. 620; 60 L. Ed. 1102.

The employer's duty to its employees is to use reasonable care and prudence to the end that the place in which they are required to work, and the appliances with which they work, are reasonably suitable and safe for the purpose and in the circumstances in which they are to be used. The test is not whether the tools to be used and the place in which the work is to be performed are absolutely safe, nor whether the employer knew the same to be unsafe, but whether or not the employer has exercised reasonable care and diligence to make them safe, Atlantic Coast Line R. Co. v. Dixon (5th Cir.), 189 Fed. (2d) 525, and this too becomes imperative and exacting as the risk increases, Larsen v. Chicago & N. W. R. Co., (7th Cir.) 171 Fed. (2d) 841. The duty of furnishing the employee with a reasonably safe place to work is firmly ingrained in the decisions of our Federal Courts. It is a continuing one from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent, Bailey v. Central Vt. R. Co., 319 U. S. 350; 63 S. Ct. 1062; 87 L. Ed. 1444, and

this, too does not have reference only to the physical condition of the place itself, but also has reference to the negligent acts of fellow employees, and the Court is required to charge upon such duty of the employer, regardless of the lack of allegation in the complaint, because in law this is known as legal-negligence. Denny v. Montour R. Co., 101 Fed. Supp. 735, citing Griswold v. Gardner, (7th Cir.) 155 Fed. (2d) 333, and Bailey v. Central Vermont R. Co., 319 U. S. 350; 63 S. Ct. 1062; 87 L. Ed. 1444.

It was the duty of the defendant company to the crew members of both trains, to take reasonable care and precaution to prevent trains on this single track railroad from colliding, and to exercise reasonable care to notify or cause to be notified, the operatives of both trains of the presence of the other train, and to give such orders as would acquaint the crew members with the conditions and circumstances then and there presented. Northern Pacific Ry. Co. v. Mix, (9th Cir.) 121 Fed. 476, 481. Appellant's brief (pages 22-24) correctly quotes statements of the crew members of each crew showing they had no knowledge of the other train upon this single track railroad. Appellant attempts to evade the effect of this testimony by stating that no duty devolved upon the Railroad Company to give the crew members notice, but none of the authorities cited sustain this view. It is alleged in plaintiff's complaint (R. 5), that engine 6015 had the right-of-way and was a through-train and the Court so instructed in regard the allegations of the complaint (R. 238-239), also, appellant attempts to evade this

duty by saying (App. Br. 24) that there was no operating rule of the Company that required notice to be given to the crew members. Regardless of operating rules, the law fixes the duty and the standard of care required to fulfill the duty, and that standard is what a reasonable man would or would not have done under the circumstances. Appellant further claims (App. Br., p. 24) that the failure to furnish a safe place to work applies or refers only to defective train equipment or right-of-way conditions, but the failure to furnish a safe place to work refers also to the negligence of any officer, agent, or employee. Denny v. Montour, 101 Fed. Supp. 735, and cases therein cited.

A case of particular interest is that of N. Y., N. H. & H. & H. R. Co. v. Zermani, (1st Cir.), 200 Fed. (2nd) 240, in which the Court held that a jury would be warranted, under the circumstances of the case, in inferring that the defendant was negligent in its supervision and conduct of a classification operation. The Court cites many of the recent cases decided since the 1939 amendment.

To determine whether there was a continuous succession of events leading proximately from fault to injury, the test is not whether the employee was acting in performance of his duty when injured, but whether his act was a normal response to the stimulus of a dangerous situation created by the fault. New York, C. & St. L. R. Co. vs. Affolder, (8th. Cir.), 174 Fed. (2nd) 486.

Appellee will now answer each specification of error in appellant's brief, commencing with Specification of Error No. 2 (App. Br., p. 46).

ANSWER TO SPECIFICATION OF ERROR NO. 2

This specification of error is based on the asserted fact that the judgment was contrary to the weight of the evidence, and that there was no substantial evidence that the defendant was guilty of negligence which, in whole or in part, contributed to the death of engineer Mely. Appellee takes the position, as well as did the lower Court, that there was a sufficient showing of negligence on the part of the carrier, even though engineer Mely might have been contributorily negligent. As was said in Louisville & N. R. Co. v. Hood, 149 Ga. 829, 102 S. E. 521, 523 (a case under the Federal Employer's Liability Act): "If the defendant was negligent, and negligent in such a way as to bring about or contribute to the injury, the fact that the plaintiff failed to exercise diligence, when under the circumstances by the exercise of diligence, he might have avoided the injury, in nowise makes his negligence the sole cause of the injury." Cited in Mumma v. Reading Co., (3 Cir.), 146 Fed. (2d) 215, 218; also citing Union Pac. Railroad Co. v. Hadley, 246 U. S. 330, 333, 38 S. Ct. 318, 62 L. Ed. 751. "It is only where the alleged negligent act or omission on the part of the employee was the sole proximate cause of his injury, without any contributing causation on the part of the employer, that the employee will be denied in toto a right of recovery under the Federal Employer's Liability Act. See Grand Trunk Western Ry. Co. v. Lindsay, 233 U. S., 42, 47, 49, 34 S. Ct. 581, 58 L. Ed. 838. The Court below very properly refused to enter judgment for the defendant. n.

o. v. on either of the grounds above discussed." Mumma v. Reading Co. (3rd Cir.) 146 Fed. (2d) 215, 218.

ANSWER TO SPECIFICATION OF ERROR NO. 4.

The Court treated both contestants impartially when it refused to instruct on each particular rule introduced in evidence or read to the jury, or on any particular rule, but instead instructed generally on the questions of duty, negligence and proximate cause. Appellant's instruction number 6 (R. 11), pertaining to railroad Rule 93 was properly refused because it directed the jury's attention to the fact that Extra 6015 East was an inferior train, whereas, under the train ordering directing engineer Mely to proceed to Arrow Station, and the Company rules making it a train of superior right, the jury had ample grounds to determine if protection should have been given as prescribed by Company Rule 99 introduced by appellee, and, furthermore, failure of the train dispatcher to impart notice or knowledge to the crew of 6015 that 1648 was ahead, stands uncontradicted, as likewise was the dispatcher's failure to notify the crew of 1648 that train 6015 was following. If the jury determined this failure to be negligence on the part of dispatcher, which it doubtless did, then the dispatcher's negligence, cannot be excused by reason of any possible assumption of risk or contributory negligence on engineer Mely's part in order to negate an inference that death was due to the employer's negligence, and the question of proximate cause, in whole or in part, was for the jury. Tennant v. Peoria

Union R. Co., 321 U. S. 29, 64 S. Ct. 409; 88 L. Ed. 520. Northern Pacific Ry. Co. v. Mix (9th Cir.) 121 Fed. 476, 481. Frabutt v. N. Y. C. & St. L. R. Co., 88 Fed. Supp. 821.

Violation of a Company rule for conduct of its employees, at most, amounts to contributory negligence or assumption of risk, neither of which is a defense under the Act. Bocook v. Louisville & N. R. Co., 67 Fed. Supp. 154; McCarthy v. Pennsylvania R. Co., 156 Fed. (2d) 877; certiorari denied. 329 U. S. 812, 67 S. Ct. 635; 91 L. Ed. 693.

The rules of railroad carriers have always been a source of confusion to the courts. On the first appeal, Atchison, T. & S. F. Ry. Co. v. Ballard (5th Cir.) 100 Fed. (2d) 162, the Court made a convincing argument why rules 93 and 99 were in conflict, and why the rule requiring the engineer to operate his train at "restricted speed" was very indefinite, but on the second appeal, Atchison, T. & S. F. Ry. Co. v. Ballard (5th Cir.) 108 Fed. (2d) 768, the same Court, over a strong dissenting opinion, made a profound argument to the effect that Rules 93 and 99 were not in conflict, and in light of the definition the term "restricted speed" was most definite. [Prior to his appointment as Secretary of State, John Foster Dulles made a convincing argument that the Bricker amendment to the Constitution of the United States should be adopted, but after he was appointed Secretary of State, he made just as convincing an argument why the Bricker amendment should not be adopted.]

It is hard to do unless one has had practice on "the flying trapeze." The law of the Atchison case, which arose prior to the 1939 amendment, has no application to the law as announced by the Supreme Court of the United States in the Tiller case.

The jury was instructed that the plaintiff was not entitled to recover if Mely was negligent, and his negligence was the sole proximate cause of his injuries. We quote the language of the Court in its instructions to the jury.

> "If you find from the evidence in this case that under all of the circumstances, engineer Mely failed to exercise reasonable care for his own safety, then he was guilty of negligence; and if you further find that such negligence was the sole proximate cause of his death, plaintiff is not entitled to recover." (R. 246.)

Special findings were neither requested by either party, nor given by the Court to the jury. It is only when the employee's act is the sole cause,—when defendant's act is no part of the causation—that defendant is free from liablity under the Act.

> "A rule promulgated by a railroad that a train entering yard limits must protect itself is contrary to the contractual obligation of the railroad to protect its train crews, and cannot be used by the railroad as a device to escape liability for its breach of duty to use reasonable care to furnish its employees with a safe place to work, otherwise the employees assume all of the risks of their employment contrary to the 1939 amendment to the Act abolishing the doctrine of assumption of risk."

Cato v. Atlantic and C. A. L. Ry. Co. (S. C.) 162 S. E. 239, certiorari denied; 284 U. S. 684, 52 S. Ct. 200, 76 L. Ed. 577.

Under the Act, the negligence of an employee is not a bar to recovery, but is only a matter affecting the amount of the recovery. Disobeying a rule of a railroad company is negligence merely, and not different in its legal effect than is negligence in other forms. Cross v. Spokane, P. S. Railway (Wash.) 291 Pac. 336, 341. Certiorari denied, 283 U. S. 821; 51 S. Ct. 345, 75 L. Ed. 1436, and whether the defendant breached its duty of maintaining a safe place to work, and is thus guilty of negligence, is a question for the jury.

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497;

Shiffler v. Penn. R. Co. (3rd Cir.) 176 Fed. (2d) 368.

ANSWER TO SPECIFICATION OF ERROR NO. 5

The case of Denny v. Montour R. Co., 101 Fed Supp., 735, and cases therein cited, is a sufficient answer to this specification of error.

ANSWER TO SPECIFICATION OF ERROR NO. 6

The case of Southern Railway Co. v. Craig (4 Cir.) 113 Fed. 76, certiorari denied, 187 U. S. 641, 47 L. Ed. 345, wherein the Court stated that notwithstanding the rules of the company, it was the duty of the crew of the switch engine to exercise ordinary care in avoiding a collision with an incoming train, is sufficient answer to

this specification of error, together with what we have previously said in answer to Specification of Error Number 4.

ANSWER TO SPECIFICATION OF ERROR NO. 7

Error is alleged because of the introduction of expert testimony by witness Myhre (not "Maury"). The lower Court should be sustained on two theories, that is, (1): The law has been decided against appellant in the case of Haines v. Reading (3rd Cir.) 178 Fed. (2d) 918. This was the only question involved in the appeal in that case; and (2): For the reason that the Court, when settling the instructions, offered to instruct the jury to disregard the expert testimony given in the case, but counsel for both parties refused the Court's offer, and thereby each of the parties waived any error that could possibly arise from the introduction of the expert testimony. The Court in its order denying appellant a new trial, or a judgment, n. o. v., said:

> "However, it is not necessary for the Court to pass on this question, because the propriety of the testimony was waived by counsel for both parties when they refused the Court's offer to instruct the jury to disregard this portion of the testimony." (R. 32-33.)

As will be noticed from the order the testimony referred to was the testimony of the expert witnesses.

CONCLUSION.

The learned District Judge demonstrated throughout the trial his thorough grasp and legal understanding of the modern decisions as applied to the Federal Act, since the 1939 amendment. There being no conflict in the evidence as to the negligence of the train dispatcher, under the conditions shown in the record, in failing to notify each crew of the presence of the other train, the Court, if the verdict had gone against the plaintiff, would have been justified in granting her a new trial.

We submit that the authorities cited in appellant's brief cannot withstand the impact of the law, as stated in the Tiller, Wilkerson and other cases cited in this brief. Judgment should be affirmed.

Respectfully submitted,

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No 14037

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Appellant,*

vs.

TILLIE MELY, as Administratrix of the Estate of A. E. Mely, Deceased, *Appellee.*

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court
for the District of Idaho
Central Division

HONORABLE CHASE A. CLARK
United States District Judge

CANNON, MCKEVITT & FRASER
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VERNER R. CLEMENTS
Weisgerber Building
Lewiston, Idaho

Attorneys for Appellant

TABLE OF CASES

APPELLEE'S AUTHORITIES — DISTINGUISHED

APPELLANT'S AUTHORITY

No. 14037

IN THE

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NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Appellant,*

vs.

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REPLY BRIEF OF APPELLANT

Appellant will reply to the brief of appellee in accordance with the headings therein set forth. Before doing so, however, it is deemed necessary to re-state the four grounds of alleged negligence on the part of the Railway Company which were submitted for jury determination. These grounds follow:

(1) Failure to provide A. E. Mely a safe place to work;

10) Failure to give A. E. Mely any warning of any kind whatsoever of the obstruction and danger ahead, as herein alleged;

(11) Failure to place men, flares or signals to give warning of said obstruction of said track a reasonable distance from said obstruction so that A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision;

(12) Failing to properly protect Train No. 1648 while it was in such obscure position aforesaid, and in failing to protect Train No. 6015 from colliding therewith by notice, signal, warning, flares, orders or any other kind of notice sufficient to warn A. E. Mely of the obstruction of said main line track.

This necessity arises because appellee has injected into this appeal issues which were never for jury determination, either as made by the pleadings or the evidence in the case. These false issues will be pointed out in the discussion of the headings above referred to.

FACTUAL OUTLINE

Under this heading it is said:

> "* * * Train 6015 East was then being operated under *special* train orders issued by the Train Dispatcher located at East Lewiston, Idaho." (Appellee's Brief, p. 1.) (Italics supplied.)

It is not pointed out wherein this train order, which

appears on page 2 of Appellee's Brief, was *special* in its nature. This order merely instructed that this train be run from East Lewiston *to* Arrow, and not *through* Arrow. On page 3 is found this language:

> "There was a dispatcher at East Lewiston (R. 79) and a station agent at Arrow station (R. 47), who could have phoned and determined that train 6015 East was running extra to Arrow Station. (R. 167-168.)"

The Railway Company was not charged specifically with negligence because of the failure of the dispatcher at East Lewiston to have advised the respective crews of the two trains as to the whereabouts of each at different times or places, or at all; neither was the Railway Company specifically charged with negligence because of the failure of the agent at Arrow to have made the telephone call above referred to in the excerpt.

Again on page 3 is found this language:

> "There were no block signals on this track."

In this connection reference is made to sub-division 9 of paragraph V of the complaint, wherein the grounds of alleged negligence are set forth:

> "Failure to provide and equip its railroad system at the place of collision with a signal block

> system to warn plaintiff's decedent of the voluntary obstruction ahead, as herein alleged." (R. 7.)

This charge of negligence was withdrawn from jury consideration. (R. 181.) The inquiry naturally arises why does counsel for appellee characterize it as a fact for consideration by this Court? On page 4 of Appellee's Brief it is said:

> "It took Engineer Mely six minutes to travel 3.1 miles, or an average speed of about thirty miles per hour. He was not traveling within yard limits the full route, and, therefore, may have exceeded a speed of thirty miles per hour *outside* yard limits." (Italics supplied.)

The inference to be drawn from this language is that counsel for appellee desires this Court to understand that within yard limits Mely was operating this train at 30 miles per hour or less. The undisputed evidence is that 1300 feet from the point of collision and within yard limits Engineer Mely was operating his train at a speed of 47 miles per hour. (R. 227.) (Defts. Ex. 27, Speed Tape on Engine No. 6015.) This speed of 47 miles per hour was maintained until Engineer Mely dynamited the train when the caboose of No. 1648 first came into his line of vision, at which time he was 980.3 feet westerly thereof. (R. 188.)

COMMENTS ON APPELLANT'S STATEMENT OF CASE

(Appellee's Brief, Page 5)

"On page 5 of appellant's brief it is asserted that certain material facts are undisputed. We draw to the Court's attention the fact that there is a dispute as to whether or not train number 6015 was being operated at restricted speed prior to the collision, and this regardless of the speed tape on engine number 6015. The fireman of engine 6015, Frank A. Reisenbigler, testified as follows:

> 'Q. Was there anything unusual in the speed of that train that drew your attention to the speed?
>
> A. No, sir.' (R. 79.)

"The brakeman of train 6015, A. G. Ferris, testified as follows:

> 'Q. Was there anything unusual in the speed of the train that you noticed?
>
> A. Not that I noticed, or was conscious of, no, sir.' " (R. 106.)

Despite the fact that the operating rule required Engineer Mely to proceed at restricted speed, despite the fact that he jumped from the locomotive in an attempt to save his life after he had discovered the train, despite the fact that after the train had been dynamited it traveled 980.3 feet and crashed into the

rear of the caboose of No. 1648, counsel would have this Court believe that there was a factual dispute as to whether or not the train was being operated at restricted speed.

OPERATING RULES AND GENERAL INSTRUCTIONS

(Ex. 24; R. 154)

(Appellee's Brief, p. 6)

Under this heading we find one of the false issues injected into this appeal: Counsel for appellee would have this Court believe that No. 6015 was a "train of superior right," as that phrase is used in the book of rules. (Ex. 24, p. 6.)

In appellant's opening brief it has already been pointed out that No. 6015 was an *extra train,* viz., a train not authorized by a time table schedule. A train of superior right is "a train given precedence by a train order." (Ex. 24; p. 6.) Undoubtedly counsel wishes this Court to believe that Train No. 6015 was *superior* to Train No. 1648, also an extra train. The fact is that these were trains of equal classification. No. 1648 had just as much right to engage in switching operations within yard limits as No. 6015 had a right to proceed within yard limits. That No. 6015 was not superior to No. 1648 is shown by the following definition in the book of rules:

"Train of Superior Class.—A train given precedence by time table." (Ex. 24, p. 7.)

It was not seen fit in Appellee's Brief to call this definition to the Court's attention. Being an extra train, No. 6015 was not a time table train, and the same applies to No. 1648.

Reference is made by appellee to Rule S-71 with the studied intent to convince this Court that No. 6015 was a superior train. The applicability of this rule was never an issue in this case. Its alleged violation was never urged in the trial of the case. As pointed out in appellant's opening brief, the Company was charged with the violation of but three operating rules—99, 101 and 108. (R. 39.)

Under the heading above referred to appellee's counsel states:

"* * * the operating rules relied upon by appellant are not dissimilar from those construed in Chicago, R. I. & P. R. Co. v. Wright, 239 U. S. 548, 36 S. Court, 185, 60 L. Ed. 431, wherein the reasonableness of the rules was submitted to the jury as a question of fact, and the same is true of the following rules involved in Southern Ry. Co. v. Craig (4 Cir.), 113 Fed. 76."

Appellant quotes syllabus 3 of the *Wright* decision:

"Master and servant—employers' liability—negligence—rules.

"3. The running of a switching engine on the main track through a deep and curved cut within the yard limits at such a rate of speed as to endanger the safety of an 'extra' which the switching crew knows may be coming through the cut on the same track is actionable negligence under the Federal employers' liability act of April 22, 1908 (35 Stat. at 65, chap. 149, Comp. Stat. 1913, sec. 8657) whether permitted by the railway company's rules or not, and renders the railway company responsible for the killing of the engineer of the extra in the resulting collision.

"(For other cases see Master and Servant, II, a, in Digest Sup. Ct. 1908.)"

The rule involved in the *Wright* case was as follows:

"All except first class trains will approach, enter, and pass through the following named yards (among them being the yard at Lincoln) under full control, expecting to find the main track occupied or obstructed." "Yard limits will be indicated by yard limit boards. Within these yard limits engines may occupy main tracks, protecting themselves against over-due trains. Extra trains must protect themselves within yard limits."

It would have been more accurate for appellee's counsel to have said that the *facts* in the *Wright* case are not "dissimilar" to the facts in the case at Bar. Indeed, the engineer in charge of the switch engine

which caused the damage in the *Wright* case was in exactly the same position as Engineer Mely. In the course of the opinion in the *Wright* case Mr. Justice Van Devanter remarked:

> "The plaintiffs took the position that the rules, if regarded as devolving upon one in the intestate's situation the measure of responsibility indicated, and permitting the switching crew to run their engine through the cut, not under control, but at high speed, when they knew that they might meet the other engine, were unreasonable in that respect. Whether the rules were thus unreasonable was submitted to the jury as a question of fact over the company's objection that the question was one of law for the court. The jury found, as the record plainly shows, that the rules were unreasonable, and that the switch engine was negligently run at greater speed than was reasonable in the circumstances. Dealing with these subjects, the supreme court of the state said (96 Neb. 87, 146 N. W. 1024): 'The decedent was running his engine under full control, within the meaning of the rule of the company. There was no express rule as to the speed allowed to the switch engine. Of course, the law requires that such engine should not be run at an unreasonable rate of speed under the circumstances. The engineer of the switch engine must have had a clear view of the approaching engine for at least 420 feet, and it was run at least 370 feet of this distance before the collision occurred. It could have been stopped within a distance of 60 feet unless running at a greater speed than 20 miles an hour; and, knowing, as the crew of the switch engine did, that No. 1486 (the extra)

was in the yards, to run at a greater speed than 20 miles an hour in such a locality and under such circumstances was in itself negligence. In such a case the court might properly have told the jury that any rule of the company which permitted such action was unreasonable, and the giving of an erroneous instruction as to the reasonableness of the rules would be without prejudice to the defendant.'

"While doubting that the rules, rightly understood, permitted the switching crew to proceed at a speed which obviously endangered the safety of the extra, which they knew might be coming through the cut on the same track, we agree that if this was permitted by the rules, they were in that respect unreasonable and void. And in either case, we think it is manifest that there was ample evidence of negligence whereon the company could be held responsible under the act of Congress

"Judgment affirmed."

We are indebted to counsel for the citation of this decision. Parenthetically, it might be remarked that had counsel for appellee been employed to institute action for the death of Eddie Feehan, the conductor in charge of No. 1648, unquestionably they would have urged that Feehan's death was brought about by the negligence of Engineer Mely in operating his train within yard limits at a high and dangerous rate of speed and in violation of the rule of the company requiring its operation at restricted speed.

With reference to *Southern Railway Company vs. Craig,* 113 Fed. 76, it is sufficient to set forth syllabi 1, 2 and 3:

"1. Master and Servant—Railroad Trains—Mode of Operation—Avoiding Collisions between Trains—Ordinary Care.

"Plaintiff's intestate, a railroad conductor on an extra train, had orders to precede a delayed regular train into defendant's yards. No instructions were given to look out for any other train on entering the yards. Intestate was killed in a collision with a switching engine in the yards. No notice of the approach of the extra train had been given to those on the switch engine. The company's rules, known to intestate, gave the right of way to switch engines in the yards, and required that extra trains must approach and run through yard limits under full control. The evidence as to whether intestate's train was under full control was conflicting. The night of the accident was shown to have been dark and foggy. *Held* that, notwithstanding the rules of the company, it was the duty of the crew of the switching engine to exercise ordinary care in avoiding collisions with incoming trains.

"2. Same—Ordinary Care—Instructions.

"An instruction that the crew of the switching engine should take proper precautions against collisions with incoming trains, the character of such precautions to be determined by the circumstances of the night, the heavy fog, and the difficulty in hearing and seeing signals, was correct.

"3. Same—Observance of Rules—Question for Jury.

"The question as to whether intestate observed the rule of having his train under full control on entering the yards was for the jury."

On page 6 of Appellee's Brief counsel makes the bald statement that

"The Court *fully* charged on the operating rules introduced in evidence * * *"

All that the learned trial Court had to say with reference to rule violation is found in the following portion of the instructions:

"There has been introduced in evidence what is designated as Rules * * * 99, 101, 108 and other general rules read to you from the Consolidated Code of Operating Rules and General Instructions. You are advised that these rules are promulgated by the railroad companies for the safe operation of their trains and do not have the effect of law.

"You are further advised that it is for you to determine whether or not such rules are reasonable and regardless of any violation of the rules, whether the defendant was negligent in any manner and whether the negligence was the proxmate cause of the death of the deceased Mely and whether the plaintiff Tillie Mely was damaged thereby." (R. 247-248.)

The "reasonableness" of Rule 93 and the attend-

ing definition of restricted speed relied upon by appellant was never an issue in the case. Had the Court given Defendant's Requested Instruction No. 6 (R. 11) it would have at least to some extent fully charged the jury in this respect. That it was the duty of the Court so to do has been clearly demonstrated in the case of *Atchison, T. & S. F. Ry. Co. vs. Ballard,* 108 Fed. (2d) 768, cited in appellant's opening brief, page 26. The following language in that decision cannot be over-emphasized:

> "Appellant, in charge after charge, requested the court to do this, and in addition, objected to the form of the general charge. This, instead of instructing directly upon the rule, as to restricted speed, its meaning and effect, that it had been violated, and that its violation was negligence, submitted to the jury, whether or not it had been violated, and whether, if it had been, the violation was negligent. Thus, there was error in submitting an issue as to the legal effect of the violation of this rule when it was the duty of the court to direct the jury, that its violation by plaintiff would be negligence. And there was error, too, in failing to instruct the jury that on the undisputed facts, plaintiff had violated it."

Again we find counsel for appellee, on pages 6 and 7 of Appellee's Brief, referring to Rule 995 and Rule 997 with the undoubted intent of impressing upon this Court that there was evidence showing a viola-

tion of these rules. Again we must point out that their violation was not pleaded; their alleged violation was raised for the first time in Appellee's Brief. Be that as it may, appellant did comply with Rule 995 in that it did issue a train order. No evidence was introduced which could in any event bring into application Rule 997 that there existed in the vicinity of this accident

> "dangerous conditions and train movements * * *"

which required the dispatcher to guard against, nor did the dispatcher issue

> "improper or unsafe combinations in train orders."

On page 7 of Appellee's Brief this language is found:

> "The train order was an express direction for him to proceed to Arrow Station and surely caused Mely to rely upon the implied assurance that, except for opposing train 661, no other train was on the track. Mely's operation was in obedience to the train order, and the jury undoubtedly found him justified in assuming a 'clear track' with the superior right to run straight through to Arrow Station. Thus, the dispatcher's train order might be considered as a fault; it certainly contributed to the collision. Miller v. Central R. Co. of New Jersey, (2nd Cir.) 58 Fed. (2d) 635, 636."

The answer to this contention is that from the very

moment Mely entered the yard limits he was expressly bound by the provisions of Rule 93 to operate at restricted speed. He had no right to assume that there would be no train on the track ahead of him. It has been pointed out in Appellant's opening brief that No. 1648 had engaged in switching operations at Arrow Station. Mely was thoroughly familiar with these operating rules; he was an experienced engineer. In the General Operating Rules governing the conduct of employees with reference to the care required of them is found the following admonition:

> "They must expect trains to run at any time on any track in either direction." (Ex. 24, p. 6.)

Here again we have a false issue injected into this appeal, viz: that the train order was in some manner misleading. The order is clear and unambiguous; it simply instructed him to proceed to Arrow. The *Miller* case, cited in support of the appellee's contention, has not the slightest factual similarity to the case at Bar, nor is it authority for the proposition that appellant's dispatcher issued a faulty, misleading or confusing train order. The complaint in that case charged negligence on the part of the conductor in ordering the deceased engineer to proceed to a cer-

tain station without the conductor ascertaining whether there was any opposing train, thereby causing the engineer to rely upon the implied assurance that none would be met on the way. The collision in the *Miller* case did not occur within yard limits. As pointed out in appellant's opening brief, the *Miller* case is authority for its position that the sole cause of Mely's death was his disobedience of Rule 93. We invite the Court's attention to the language from the *Miller* decision quoted on page 39 of appellant's opening brief, wherein the distinction between trains operating within and without yard limits is clearly defined. Referring to the facts in the *Miller* case, the Court of Appeals of the Second Circuit used this language:

> "It seems to us that the situation involved two concurring acts of contributory negligence and was not one where the employee has disobeyed the rule and is 'primarily' responsible."

In further support of the false issue that

> "The dispatcher's train order might be considered as a fault; it certainly contributed to the collision." (Appellee's Brief, p. 7.)

appellee cites the decision of this Court in *Atchison, T. & S. F. Ry. Co. vs. Seamas,* (9th Cir.) 201 Fed. (2d) 140. We quote syllabi 5 and 6:

"5. Master and Servant. When a general order is given, an employee must use ordinary care in its execution, and the giving of the order does not affect the question whether the servant has been negligent in his manner of carrying it out, where there is a choice open to him.

"6. Master and Servant. In action under Federal Employers' Liability Act, whether plaintiff, who was knocked from car brake platform which was out of sight of foreman and engineer but to which he had climbed after being instructed by foreman to check brakes on car, knew or should have known that his choice of a manner in which to carry out the order exposed him to an unreasonable risk was question for jury. Federal Employers' Liability Act, Sec. 1, 45 U.S.C.A., Sec. 51."

What appellee overlooks is that in the *Seamas* case the injured party complied with a general order given to him by his superior, while in the instant case Mely was acting in violation of a special rule promulgated for his own safety. Also on page 7 of Appellee's Brief is found this language:

"The jury could consider that defendant was negligent when its dispatcher sent both crews in the same direction on a single track without telling them specifically of the presence of the other. Williams v. Reading Co., 99 Fed. Supp. 960, 962."

Denying the motion of defendant railway company for judgment n.o.v. in the cited case, District Judge

Clary (U. S. Dist. Ct., E. D. Penn.) used the following language:

> "The jury was free to believe that the defendant was negligent in failing to provide a safe place to work, i.e. it could have found that the road bed was weak and that condition caused the plaintiff to slip. It is possible, under the evidence, for the jury to have found that plaintiff did not look and that if he had looked he would have seen a train in the distance, but that, absent the weak road bed, he would have negotiated the crossing safely. This would certainly make the plaintiff guilty of contributory negligence, but it leaves to the jury the question of defendant's negligence in permitting a condition to exist which caused plaintiff to slip and place him in the position of danger. There is a further point the jury might have considered, that defendant was negligent in that the foreman, with specific knowledge that a train was due on Number 4 track, sent plaintiff out on an assignment requiring him to cross the Number 4 track without telling him specifically that a train was due momentarily on that track."

In connection with the alleged negligence of the dispatcher above referred to, we assume that he would have discharged his full duty if he had added to the train order the following language:

> "Extra 1648 is stationary on line at Arrow."

What then? Engineer Mely would have entered the yard limits at *restricted speed*. In this connection

how apt is the language of Mr. Justice Holmes in *Unadilla Valley Ry. Co. vs. Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224, referred to and quoted from at pages 39, 40 and 41 in appellant's opening brief:

> "Still considering the case as between the petitioner and Caldine, it seems to us even less possible to say that the collision resulted in part from the failure to inform Caldine of the telephone from train No. 15. A failure to stop a man from doing what he knows that he ought not to do hardly can be called a cause of his act. Caldine had a plain duty, and he knew it. *The message would only have given him another motive for obeying the rule that he was bound to obey.*"

PREFACE

(Appellee's Brief, p. 8)

The writer of this brief has not had occasion to read "Beyond the High Himalayas" by Justice William O. Douglas. Suffice it to say that the "event" in the case at Bar was the death of Engineer Mely; "the cause of that event" was the violation of Rule 93.

APPELLATE REVIEW

(Appellee's Brief, p. 8)

This heading is simply an academic discussion. Appellant has no quarrel with the general principles of law announced in the cases cited.

With reference to Rule 61 of the Federal Rules of Civil Procedure (harmless error), it is asserted that the errors specified in the appellant's opening brief were particularly harmful to appellant. The action of the trial Court in denying the motion for judgment n.o.v. or in the alternative for a new trial was "inconsistent with substantial justice."

COMPARATIVE NEGLIGENCE RULE

(Appellee's Brief, p. 10)

Appellant is at a loss to understand why appellee labors the "assumption of risk" doctrine and the fact that it was "swept into discard with the adoption of the 1939 amendment to the act * * *"

As this learned Court well knows, prior to the 1939 amendment assumption of risk was a defense that had to be affirmatively pleaded. Appellant did not stultify itself by urging it as a defense in the trial of the case; it contented itself with endeavoring to establish that the sole and efficient cause of Mely's death was his violation of an operating rule. We confidently assert, however, that there was one risk that Mely did assume, viz: the risk that arose out of his own negligence.

STATUTORY LAW

(Appellee's Brief, p. 11)

No comment.

ARGUMENT

(Appellee's Brief, p. 12)

Under this heading appellee asserts that the cases cited by appellant in its opening brief

> "are the type of cases which were swept into discard with the adoption of the 1939 amendment to the Federal Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444; 87 L. Ed. 610."

Again counsel raises the ghost of assumption of risk. In none of the opinions handed down since the 1939 amendment to the Federal Act have the Courts ever relieved a plaintiff under that Act from the imperative duty of establishing actionable negligence before a recovery can be had thereunder. The Federal Employers' Liability Act has not as yet by judicial pronouncement become a workmen's compensation act.

NEGLIGENCE

(Appellee's Brief, p. 15)

Appellee again refers to the absence of an automatic block signal. It graciously conceded that

> "* * * the railroad was not negligent in failing to provide a block signal system."

The argument is made, however, that by virtue of its absence the jury was not prevented from holding the railroad to a greater degree of caution than if the system had been blocked.

Under this heading it is urged that a jury question was presented on the failure of the appellant to furnish a safe place to work. This could only refer to the failure of the dispatcher at East Lewiston to have given the information to the respective train crews heretofore referred to. On page 17 of Appellee's Brief it is said:

> "It was the duty of the defendant company to the crew members of both trains to take reasonable care and precaution to prevent trains on this single railroad track from colliding and to exercise reasonable care to notify or cause to be notified the operatives of both trains of the presence of the other train, and to give such orders as would acquaint the crew members with the conditions and circumstances then and there presented. *Northern Pacific Ry. Co. v. Mix,* (9th Cir.) 121 Fed. 476, 481."

Syllabus 5 in the *Mix* case is enlightening:

> "The rules of a railroad directing the action of the train dispatcher are prima facie evidence of what is due care on his part and a violation thereof is prima facie evidence of negligence."

The following excerpt from the opinion of this Court in the *Mix* case is sufficient to indicate how hard pressed is appellee for authority:

> "The objection that the complaint does not charge the defendant company with any negligence is without merit. It charges that the defendant sent the plaintiff, as brakeman on one of its trains, along its single track and negligently omitted to give the plaintiff or any of the crew operating with him notice that it was at the same time sending another train in the opposite direction on the same track, which trains must necessarily meet within a very short time, and without making any provision for either train to take a siding. That is a sufficient averment of negligence."

Again on page 17 it is said:

> "It is alleged in plaintiff's complaint (R. 5), that engine 6015 had the right of way and was a through train and the Court so instructed in regard to the allegations of the complaint. (R. 238-239) * * *"

This allegation was denied in defendant's answer. (R. 10, Par. 2.) It is true that the Court instructed the jury with reference to this allegation. It is likewise true that the Court instructed that the defendant had denied it. It is also true that no evidence was introduced by plaintiff to sustain this allegation.

On page 18 of Appellee's Brief it is said:

> "Appellant further claims (App. Br., p. 24) that the failure to furnish a safe place to work applied or refers only to defective train equipment or right of way conditions, but the failure to furnish a safe place to work refers also to the negligence of any officer, agent, or employee. Denny v. Montour, 101 Fed. Supp. 735, and cases therein cited."

Appellee distorts the language of Appellant's Brief. What was said was this:

> "As to the *alleged* failure of the appellant company to furnish the deceased with a safe place to work, suffice it to say that this could only refer to defective train equipment or right of way conditions." (Appellant's opening brief, p. 24.)

The *Montour* case cited by appellee contains this language:

> "Plaintiff believed it was his responsibility under the rules and regulations which governed his duties to protect the property of the company and he endeavored to open the angle cock, which was a mechanical contraption on the last car, which by opening would have caused an emergency stop. Difficulty arose with this piece of equipment and as a result thereof due to the failure of the equipment to work and the failure of the engineer to stop the train after due notice had been given, plaintiff was pinned between the two cars.
>
> "Plaintiff had reasonable cause to believe the engineer would stop the train.

"It is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save the property of the railroad from harm and damage. Re-statement of the Law, Torts, Sec. 472.

"Whether or not the actions of plaintiff amounted to contributory negligence in view of the circumstances was for the jury.

"There was ample evidence to require submission to the jury the question of whether or not the negligence of the engineer in failing to promptly heed the signal and to bring the train to a prompt stop, coupled with the failure of the emergency valve to work properly, which factors combined to make the place where plaintiff was working unsafe, in whole or in part caused plaintiff's injury.

"It is not unreasonable to conclude that the conditions under which the plaintiff was required to do his work and the manner in which his fellow employees performed the responsibilities of their assignment constituted an unsafe and dangerous working place and that such conditions were a proximate cause of the accident in whole or in part.

"Furthermore, there is evidence in the record to show that the defendant did not provide reasonably safe appliances with which to work which was a proximate cause of the accident."

ANSWER TO SPECIFICATION OF ERROR NO. 2

(Appellee's Brief, p. 19)

What has heretofore been said establishes that the

verdict and judgment were clearly contrary to the weight of the evidence. It is asserted that the evidence clearly establishes that Mely's negligence was the sole and proximate cause of his death within the meaning of the decisions cited in Appellee's Brief.

ANSWER TO SPECIFICATION OF ERROR NO 4

(Appellee's Brief, p. 20)

Under this heading appellee takes the position that Appellant's requested Instruction No. 6 was properly refused because:

> "it directed the jury's attention to the fact that Extra 6015 East was an inferior train, whereas, under the train order directing Engineer Mely to proceed to Arrow Station, and the Company rules making it a train of superior right, the jury had ample grounds to determine if protection should have been given as prescribed by Company Rule 99 introduced by appellee, and, furthermore, failure of the train dispatcher to impart notice or knowledge to the crew of 6015 that 1648 was ahead, stands uncontradicted, as likewise was the dispatcher's failure to notify the crew of 1648 that train 6015 was following."

The contention that Train 6015 was a train of "superior right" is a pure figment of the imagination of counsel for appellee. Appellant asserts that it has already shown that Trains 6015 and 1648 were trains

of equal classification. They were both extra trains; they were not running in opposite directions; both were eastbound trains out of East Lewiston, Idaho. Appellant feels that with propriety the excerpt from Appellee's Brief above quoted is garbled language.

The assertion that the jury had ample grounds for determining if Rule 99 had been violated is utterly without factual foundation. It has already been pointed out that Rule 99 refers to operation of trains outside of yard limits.

The jury in this case did not determine that the failure of the dispatcher to notify the train crews was in and of itself negligence. On the contrary, as shown by the affidavits of eleven jurors filed in support of the motion for a new trial, they acted under the mistaken assumption that there was a specific operating rule of the company that required the dispatcher to give such notice. (R. 18 et seq.) Furthermore, not one qualified witness was called to establish the fact, if it were a fact, that safe, careful and proper railroading required the dispatcher to give such notice even in the absence of a specific operating rule.

Counsel for appellee wrestle mightly in an attempt

to circumvent the opinion of the Fifth Circuit Court of Appeals in *Atchison, T. & S. F. Co. vs. Ballard,* 108 Fed. (2d) 768. In this regard they bring into this appeal the so-called conflicting positions on the proposed Bricker Amendment to the Constitution of the United States as taken by the distinguished Secretary of State, John Foster Dulles. For what reason appellant is not able to discern, unless it is attempted to indicate that the Fifth Circuit in the *Ballard* case blew hot and cold on two separate occasions.

Still dealing with Appellant's Specification of Error No. 4, counsel for appellee, on page 22 of Appellee's Brief, uses this language:

> "Special findings were neither requested by either party, nor given by the Court to the jury. It is only when the employee's act is the sole cause,—when defendant's act is no part of the causation—that defendant is free from liability under the Act.
>
> " 'A rule promulgated by a railroad that a train entering yard limits must protect itself is contrary to the contractual obligation of the railroad to protect its train crews, and cannot be used by the railroad as a device to escape liability for its breach of duty to use reasonable care to furnish its employees with a safe place to work, otherwise the employees assume all of the risks of their employment contrary to the 1939

amendment to the Act abolishing the doctrine of assumption of risk'

"Cato v. Atlantic and C. A. L. Ry. Co., (S. C.) 162 S. E. 239, certiorari denied; 284 U. S. 684, 52 S. St. 200, 76 L. Ed. 577."

Now witness this portion of the opinion in the *Cato* case:

"O. C. Cato was employed by the appellants as a car repairer, under the supervision and control of R. W. Watson, general foreman of appellants' yards at Hayne Junction, and on December 6, 1926, was ordered by appellants to proceed to track No. 10, and repair the drawhead of a baggage car which had two days before been placed on that track. Cato was informed that the drawhead of the car must be repaired so it could be taken to the car repair shop of the Southern Railway Company, about one and a half miles from Hayne Junction, in Spartanburg county, for general repairs.

"It was necessary for Cato to go underneath the baggage car to perform his duties and, while there engaged in repairing the car, a switch engine backed into a cut of cars coupled to the baggage car, underneath which Cato was working, causing the wheels of the baggage car to pass over his body, horribly mutilating him, subsequently causing his death. Appellants failed to protect Cato and the other men working upon the said baggage car with a blue flag, as required by the agreement entered into between the Southern Railway Company, and others, and the Brotherhood of Railway Carmen of America, and oth-

ers, effective March 1, 1926, which superseded all other rules and agreements up to that date, copy of which agreement was delivered to Cato by the railway company, and under the guidance of which he performed his duties as a car repairer for the appellants, and upon which he relied for protection while repairing the baggage car upon the said track. The agreements upon which the action is based provides, among other things:

"'55. *Employees Required to Work Under Locomotives and Cars.*—No employee will be required to work under a locomotive or car without being protected by proper signals. Where the nature of the work to be done requires it, locomotives or cars will be placed over a pit, if available.'

"'158. Trains or cars, while being inspected or worked on by train-yard men, will be protected by a blue flag by day and a blue light by night, which will not be removed except by men who place them.'

"'163. Carmen Sent Out on Road to Perform Work.—When necessary to repair cars on the road or away from the shops, carmen will be sent out to perform such work. Two carmen, or one carman and an experienced helper, will be sent to perform such work as putting in couplers, draft rod, draft timbers, arch bars, truss rods, and wheels and work of similar character.'

"'175. *Miscellaneous.*—Except as provided for under the special rules of each craft, the general rules shall govern in all cases.'"

The *Cato* case was decided by the Supreme Court

of South Carolina on September 10, 1931. If appellee is quoting from the *Cato* case, as appears to be the fact on pages 22 and 23 of the Brief, how could the Supreme Court of South Carolina in 1931 be dealing with the 1939 Amendment to the Federal Employers' Liability Act?

ANSWER TO SPECIFICATION OF ERROR NO. 5
(Appelee's Brief, p. 23)

Appellant has heretofore answered this answer to specification of Error No. 5.

ANSWER TO SPECIFICATION OF ERROR NO. 6
(Appellee's Brief, p. 23)

Appellee recites that the case of *Southern Railway Company vs. Craig, supra,* is sufficient answer to appellant's specification of Error No. 6.

Appellant has heretofore discussed the *Craig* case.

ANSWER TO SPECIFICATION OF ERROR NO. 7
(Appellee's Brief, p. 24)

Resisting this specification of error, which dealt with the admission of expert testimony offered by

appellee over appellant's objection, as to the interpretation of operating rules, counsel for appellee states:

> "The law has been decided against appellant in the case of Haines v. Reading, (3rd Cir.) 178 Fed. (2d) 918."

This is a brief *per curiam* opinion; appellant sets it forth:

> "This is a civil action brought under the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51 et seq., by a railroad conductor who was injured in the course of the shifting of freight cars in a classification yard of the defendant. The plaintiff recovered a verdict. Judgment was entered thereon and the defendant has appealed. The defendant asserts that the trial judge erred in admitting in evidence certain of its rules relating to the use of air brakes and the placing of materials on top of cars and in permitting the jury to base its verdict on the alleged violation of these rules. We see no merit in this contention. The rules in question were identified and explained as applicable to the facts of the case by a witness, a retired employee of the defendant, whose 37 years experience as fireman, brakeman, conductor, assistant yardmaster, yardmaster, general yardmaster and assistant trainmaster obviously qualified him as an expert. Although two employees of the defendant testified that these rules were not applicable, an issue of fact with respect thereto was raised which the trial judge rightly submitted to the jury. The jury was justified in finding from the evidence

> that the defendant's failure to comply with the rules in question constituted negligence on its part which was the proximate cause of the plaintiff's injuries. There is, therefore, no merit in the defendant's contention that there was no evidence to support the verdict."

A second reason assigned against this specification of error on the part of appellant is the statement in Appellee's Brief, page 24, that the Court:

> "offered to instruct the jury to disregard the expert testimony given in the case, but counsel for both parties refused the Court's offer, and thereby each of the parties waived any error that could possibly arise from the introduction of the expert testimony. The Court in its order denying appellant a new trial, or a judgment n.o.v., said:
>
> " 'However, it is not necessary for the Court to pass on this question, because the propriety of the testimony was waived by counsel for both parties when they refused the Court's offer to instruct the jury to disregard this portion of the testimony.' (R. 32-33.)
>
> "As will be noticed from the order the testimony referred to was the testimony of the expert witnesses."

This was a gratuitous assertion made by the trial Court in denying the motion of appellant for judgment n.o.v. or in the alternative for a new trial. There is not a syllable of evidence in the printed record

apart from the Court's order that appellant *refused* the offer of the Court to withdraw this evidence; the fact remains that it is in the record over appellant's objection, and if the Court at some stage of the proceedings reached the conclusion that the objection was well taken, then, of its own motion, the Court should have withdrawn the evidence from jury consideration.

CONCLUSION

(Appellee's Brief, p. 25)

Under this heading it is said:

> "There being no conflict in the evidence as to the negligence of the train dispatcher, under the conditions shown in the record, in failing to notify each crew of the presence of the other train, the Court, if the verdict had gone agaist the plaintiff, would have been justified in granting her a new trial."

Appellant asserts that we have here now a tacit admission by appellee that the only actionable negligence on the part of the appellant was the failure of the dispatcher at East Lewiston to have notified the crew members of 6015 and 1648 as to the whereabouts of each other.

This Honorable Court, from a study of the Transcript of the Record should reach but one conclusion,

viz: that appellee was relying for a recovery on the trial amendment which charged a violation of Rules 99, 101 and 108. In this respect reference is made to the calling of the expert Myhre. Negligence in this respect has now been abandoned. In short, appellee now asserts that the cause of Engineer Mely's death was the alleged negligence of the dispatcher at East Lewiston as hereinbefore referred to. The entire record indicates that this was but an afterthought on the part of appellee.

It is respectfully submitted that the sole and efficient cause of the engineer's death was his violation of Rule 93.

In the alternative, appellant asserts that a new trial should be granted.

Respectfully submitted,

CANNON, MCKEVITT & FRASER
VERNER R. CLEMENTS

Attorneys for Appellant.

No. 14038.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RONALD J. CORRIGAN,

Appellant,

vs.

SECRETARY OF THE ARMY, *et al.*,

Appellees.

APPELLEES' REPLY BRIEF.

LAUGHLIN E. WATERS,
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TOPICAL INDEX

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APPELLEES' REPLY BRIEF.

Statement of the Case.

The facts of this case are very clear-cut by the Appellant's own admissions. It appears that the Appellant Corrigan was summoned by his Selective Service Board to report for induction on April 15, 1953. Prior to that time he had never claimed to be a Conscientious Objector [Tr. 49]. In fact, prior to the time of his induction, he had been a member of the Enlisted Reserves of the United States Army [Tr. 51]. On the morning of April 15, 1952, Corrigan appeared at the Induction Station at approximately 9:00 o'clock in the morning. In the following three to four hours Corrigan took a physical examination and was interviewed by a Sergeant Castaneda. Corrigan admits that when Castaneda asked him if he had ever been a Conscientious Objector, he replied "No" [Tr. 53]. Sergeant Castaneda likewise testified that on the morning in question he made no report to his supe-

riors of any Conscientious Objectors appearing in his interviews [Tr. 27].

By Corrigan's own admission he became a Conscientious Objector while sitting in the room at the Induction Station [Tr. 49]. It appears, therefore, that he suddenly sought to claim exemption as a Conscientious Objector when he became conscious of the fact that the swearing in proceedings were ending.

Captain Beydler testified that Corrigan's name was called along with others on the roster [Tr. 17] after the individuals in the room were advised that the induction was about to begin. Beydler testified that he heard responses to every name called [Tr. 17]. Corrigan admitted that he replied "Here" when his name was called [Tr. 50] and that he made no objection to induction at that time [Tr. 50].

Corrigan stood up with the other inductees present but claimed that he did not "step forward." He admits that due to the congested conditions in the room many of the other inductees merely shuffled their feet or did nothing when told to step forward [Tr. 28].

Argument.

All of the issues set forth in the four Specifications of Error urged by the Appellant in this case can actually be treated as one simple issue. This issue involves a question of fact rather than law. That issue is, did Corrigan so conduct himself as to meet the procedural requirements for induction, including the "stepping forward" provided in Section 23, Paragraph 23 of Special Regulation No. 615-180-1 issued by the Department of the Army on 10 April 1953.

The court below found as a question of fact that Corrigan responded to his name and took one step forward [Tr. 23]. This finding of fact may not be upset upon appeal except upon a showing that it was based upon no evidence whatsoever. Such is not the case here. While Corrigan denies that he "stepped forward" he admits to participating in every other step in the induction proceedings except that one physical act. His other actions are totally inconsistent with his claim that he did not "step forward." By his own admission he had never claimed to be a Conscientious Objector and even on that particular date had made no claim that he was a Conscientious Objector when interviewed. Furthermore, he went through three or four hours of induction preliminaries, took his place in the induction room, and heard the inducting officer inform him of the imminence of the induction. After being advised "You will take one step forward as your name and service are called and such step will constitute your induction into the armed service indicated," he responded when his name was called but says that he did not move his feet. His actions, however, belie that statement.

If we were to adopt the theory of the Appellant in this case, it would become absolutely necessary that every individual being inducted into the armed forces of the United States would have to step out in plain sight where the inducting officer could watch to see if he moved his feet. Otherwise, any of the inductees could claim, like Corrigan now claims, that although he did everything else required for induction, he did not move his feet, and therefore he had not been inducted. This would make the present induction process absurd.

There is one additional very vital factor involved here. When Corrigan responded to the calling of his name, he made no protest to his being inducted. While the inducting officer could not see him move his feet because of the crowded room, the inducting officer could have heard Corrigan had he made any protest. By Corrigan's own admission, however, he made no such protest. Under the circumstances the court below could hardly do anything other than resolve the factual issue against the Appellant Corrigan.

The Appellant makes a point of the fact that the Court commented from the bench [Tr. 63] that the Appellant made up his mind too late. Appellant then contends that a selectee can make up his mind during the last split second. However, the evidence here indicates that the Appellant made up his mind after the induction was an accomplished fact even though it might have been only a matter of moments after that event.

The gist of the Appellant's theory in this case is that he is entitled to be tried as a draft dodger in the criminal courts of the United States rather than tried as a deserter in the military courts. That hardly seems to be a reasonable or equitable grounds for giving this Appellant any special consideration.

Conclusion.

It is respectfully submitted that there is no legal issue involved here and for that reason no legal authorities, other than the pertinent regulation, are cited. The issue is one of fact. As an issue of fact, an appellate court should not upset a finding of the lower court unless there is a total absence of evidence to support that finding. Such is not the case here. The inducting officer, and the court below, had every reason to believe that Corrigan had submitted to induction into the armed forces. Under those circumstances, the finding of the court below should not be disturbed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;
MAX F. DEUTZ,
Assistant U. S. Attorney,
Acting Chief of Civil Division,
Attorneys for Appellees.

No. 14039

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HOME DAIRIES COMPANY,
Respondent.

Transcript of Record

Petition for Enforcement of Order of the
National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

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GENERAL COUNSEL'S EXHIBIT No. 1-E

United States of America
Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-691

In the Matter of HOME DAIRIES COMPANY

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL No. 483, AFL.

COMPLAINT

It having been charged by Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 483, AFL, hereinafter referred to as the Union, that Home Dairies Company, hereinafter called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth in the Labor-Management Relations Act of 1947, 61 Stat. 136, hereinafter called the Act, the General Counsel of the National Labor Relations Board, on behalf of such Board, by the Regional Director for the Nineteenth Region, acting pursuant to the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Home Dairies Company is, and at all times material hereto has been, a corporation incorporated under the laws of the State of Idaho, having its prin-

cipal place of business at Nampa, Idaho, engaged in the business of processing and selling dairy products.

II.

In the course of its business as set forth above, Respondent, during the twelve-month period preceding July 1952, made total purchases having a value of approximately $100,000, of which an amount of $75,000 was purchased from sources outside the State of Idaho. During the same period, Respondent made sales of products valued at approximately $100,000. All such sales were shipped directly to customers outside of the State of Idaho.

III.

Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 483, AFL, is, and at all times alleged herein has been, a labor organization within the meaning of Section 2 (5) of the Act.

IV.

The following unit is now, and at all times material herein has been, an appropriate unit within the meaning of Section 9 (b) of the Act:

All inside plant employees, drivers, salesmen, outside drivers, and milk haulers who are employed in Respondent's plants at Nampa and Caldwell, Idaho; excluding managers, assistant managers, superintendents, office and clerical employees, foremen, guards, and special employees.

V.

On or about July 18, 1952, and at all times thereafter, Respondent failed and refused to bargain in

good faith after appropriate demand with the Union as the exclusive representative of all employees in the unit described above with respect to rates of pay, wages, hours of employment or other conditions of employment by, inter alia:

(a) failing and refusing to meet for bargaining purposes with the Union until proof of the Union's claim of majority through an election was furnished by Respondent;

(b) embarking upon a campaign designed to coerce and intimidate its employees with the intention of destroying the Union's majority;

(c) meeting with an organization known as the Employees' Committee and attempting to bargain with it in derogation of the rights guaranteed the employees in Section 7 of the Act; and

(d) granting to its employees a wage increase without bargaining or giving notice to the Union.

VI.

On or about July 18, 1952, and at all times since, Respondent, by its officers, agents, and supervisors, while engaged in the operations described above, has interfered with, restrained, and coerced its employees and is now interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act by, inter alia:

(a) urging, persuading, and coercing their employees by threats of reprisal or promise of benefit to refrain from assisting, becoming, or remaining members of the Union or engaging or continuing to engage in concerted activities for the purpose

of collective bargaining or other mutual aid or protection;

(b) threatening their employees with loss of employment should they authorize the Union to represent them in collective bargaining;

(c) promising wage increases if they should repudiate the Union; and

(d) engaging in interrogation of certain employees about their union affiliation and surveillance of the meetings of the employees with the Union.

VII.

On or about July 18, 1952, Respondent, by its officers and agents, while engaged in the operations described above has dominated and supported the Employees' Committee by inter alia:

(a) causing its employees to select representatives to the Employees' Committee to meet with the Employer for purposes of collective bargaining on behalf of the employees with respect to rates of pay, wages, hours of employment and other condition of employment;

(b) meeting with the representatives so chosen and in engaging in discussion concerning wages, hours, and working conditions; and

(c) questioning the members concerning the demands and desires of the employees as to wages, hours, and working conditions.

VIII.

Employees' Committee is, and at all times herein mentioned has been, a labor organization within the meaning of Section 2 (5) of the Act.

IX.

By the acts described in paragraphs V, VI and VII, and each of them, and for reasons therein set forth, Respondent interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act; and by all of said acts, and each of them, Respondent has engaged in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

X.

By the acts described in paragraph V, and by each of them, and for the reasons therein set forth, Respondent did refuse and fail to bargain with the Union as the representative of their employees in the appropriate unit set forth in paragraph IV, above, and thereby has engaged in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

XI.

By the acts described in Paragraph IX, and each of them, Respondent dominated, supported, and assisted the Employees' Committee, thereby interfering with the formation or administration of that labor organization and thereby has engaged in unfair labor practices within the meaning of Section 8 (a) (2) of the Act.

XII.

The activities of Respondent, as set forth in paragraphs V, VI, VII, and VIII, above, occurring in connection with the operations of Respondent as described in paragraphs I and II, above, have a

close, intimate, and substantial relation to trade, traffic, and commerce among the several states of the United States and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XIII.

The aforesaid acts of Respondent constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) (2) and (5) and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 17th day of October, 1952, issues this Complaint against Home Dairies Company, the Respondent herein.

[Seal] /s/ THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
Region 19.

GENERAL COUNSEL'S EXHIBIT No. 1-G

[Title of Board and Cause.]

ANSWER

Comes now the Home Dairies Company, respondent in the above entitled case, and for its answer to the complaint specifically denies each and every allegation contained therein not hereinafter admitted, qualified or explained.

I.

Respondent admits paragraph I of the complaint,

and with reference to Paragraph II respondent alleges that under the provisions of the Oregon Milk Control Act milk sold or distributed in Oregon must be purchased from producers of the State of Oregon, but in connection with said operation respondent feels that it is entitled to the exemption provided in section 3 of the National Labor Relations Act as a business engaged in an agricultural pursuit and that the employees of the respondent are, therefore, agricultural laborers.

II.

Respondent admits paragraphs III and IV of the complaint but denies paragraph V and the whole thereof, and with reference to sub-paragraph (a) respondent alleges that it has always been willing, and is at the present time willing, to bargain with the duly selected representative of its employees. Respondent denies sub-paragraph (b) but in connection with sub-paragraph (c) admits that respondent had a meeting at the request of an employee committee but at said time and place there was no collective bargaining but a simple request on the part of the committee that the respondent consider certain grievances and complaints which the respondent agreed to do.

With reference to subparagraph (d) of paragraph V the respondent admits that certain necessary wage increases were given to those employees consistent with the Company's ordinary business practices and under the advice of its counsel, said increases having been given after the Union failed to carry a majority in a consent election.

III.

Respondent denies paragraph VI of the complaint and the whole thereof and specifically denies subparagraphs (a), (b), (c) and (d), and as to subparagraph (a) alleges that the statements contained therein are absolutely false and untrue and at no time did respondent make threats of reprisals or promises of benefits to its employees in connection with Union membership or Union activities, and that in connection with the allegations in paragraphs (b), (c) and (d) respondent denies all of said paragraphs and in connection therewith respondent alleges that it was properly advised as to its legal responsibilities in connection with said subparagraphs and at no time did it violate section 7 or any provisions of the Act.

IV.

With reference to paragraph VII, respondent denies that it caused the employees to form a committee or that any committee was chosen at the instance of this respondent for the purpose of engaging in a discussion under collective bargaining, and in connection therewith respondent alleges that certain of its employees volunteered to meet with the Company and to present to the Company certain grievances and requests and that at said meeting the Company had its attorney present but upon the demand of the committee chairman the attorney was excused and the grievances were presented by the committee and the same were taken under consideration.

Respondent denies paragraph VIII and in connection therewith alleges that said committee has not qualified as a labor organization within the meaning of section 2(5) of the Act, nor has said committee to the knowledge of this respondent registered its officers or filed its non-communist affidavits as provided by law. Respondent denies paragraph IX and the whole thereof and denies that it has committed any unfair labor practices under the meaning of section 8(a)(1) or any other section of the Act.

V.

Respondent denies paragraphs X, XI and XII, and with reference to paragraph XII denies that any acts on the part of respondent have led to or would lead to labor disputes, and denies paragraph XIII insofar as said paragraph states that the respondent has been guilty of unfair labor practices.

Wherefore, respondent asks that the complaint in the above entitled action be dismissed.

HOME DAIRIES COMPANY,
/s/ E. A. WESTON,
Attorney.

[Duly Verified.]

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Mr. Paul E. Weil, for the General Counsel.

Mr. F. T. Baldwin, of Boise, Idaho, for the Union.

Mr. Eli A. Weston, of Boise, Idaho, for Respondent.

Before: Martin S. Bennett, Trial Examiner.

Statement of the Case

This proceeding, brought under Section 10 (b) of the National Labor Relations Act, 61 Stat. 136, herein called the Act, stems from a charge duly filed by Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, herein called the Union, against Home Dairies Company, herein called Respondent. Pursuant to said charge the General Counsel of the National Labor Relations Board issued a complaint dated October 17, 1952, against Respondent, alleging that Respondent had engaged in unfair labor practices within the meaning of Section 8 (a) (1) (2) and (5) of the Act.

Specifically the complaint, as amended, alleged that on and after July 18, 1952, (1) Respondent had refused to bargain in good faith with the Union as the representative of its employees in an appropriate unit; (2) had interfered with, restrained and coerced its employees by threats of reprisal and loss of employment if they engaged in union activities or chose the Union to represent them, by promising wage increases if the employees would repudi-

ate the Union, and by interrogating employees and engaging in surveillance of union meetings; and (3) had dominated and contributed support to a labor organization known as "Employees' Committee" by causing its employees to select representatives to the Employees' Committee and meeting with said representatives to discuss wages, hours, and working conditions. Respondent's answer denied that it had engaged in the conduct attributed to it by the complaint and denied that it had engaged in unfair labor practices.

Pursuant to notice a hearing was held at Nampa, Idaho, on November 3, 1952, before the undersigned Trial Examiner, Martin S. Bennett, duly designated by the Associate Chief Trial Examiner. The General Counsel and Respondent were represented by counsel and the Union by its representative. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the conclusion of the hearing, the parties were afforded an opportunity to present oral argument and to file briefs and proposed findings and conclusions but waived same.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The business of Respondent

Home Dairies Company is an Idaho corporation whose principal place of business is at Nampa, Idaho, where it is engaged in the business of produc-

ing and selling dairy products. It also maintains an office at Caldwell, Idaho, 7 miles distant, for the same purpose. During the year ending in July of 1952, Respondent sold products valued at approximately $112,500, of which substantially all was shipped to customers outside the State of Idaho. The undersigned finds that Respondent is engaged in commerce within the meaning of the Act.

The corporate stock of Respondent is owned by 5 persons who also constitute a partnership owning all interest in Woodlawn Dairies, a dairy firm whose place of business is also at Nampa. This latter firm has no plant as such and maintains only a small business office in Nampa. Supervision of both concerns is identical and Woodlawn has but one employee, a driver, who operates a milk route 6 days a week. Woodlawn Dairies owns no processing equipment, but, under an agreement with Respondent, the latter buys, processes, and sells milk to Woodlawn f.o.b. Respondent's Nampa plant. Woodlawn is charged only for the milk, the bottles and cases being owned by Home Dairies which retains title and makes no charge for them. Woodland owns 2 trucks but employs only one driver, the other truck remaining on a stand-by basis. These trucks are maintained by Respondent for Woodlawn on a monthly fee basis. Woodlawn also owns some office equipment which however is utilized by Respondent. Each firm pays the other directly for all services rendered.

In view of the foregoing, the undersigned finds that Home Dairies Company and Woodlawn Dairies

constitute an integrated unitary enterprise and that the two firms constitute a single employer within the meaning of the Act.

II. The labor organization involved

Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, is a labor organization admitting to membership employees of Respondent.

III. The unfair labor practices

A. The appropriate unit and majority representation therein

The complaint alleges and Respondent's answer admits that all inside plant employees, drivers, salesmen, outside drivers, and milk haulers who are employed in Respondent's plants at Nampa and Caldwell, Idaho, excluding managers, assistant managers superintendents, office and clerical employees, foremen, guards, and special employees, constitute a unit appropriate for the purposes of collective bargaining.

As set forth above, Respondent and Woodlawn Dairies are an integrated unitary enterprise. The records warrants a finding that there is a community of interest in the working conditions of the one employee of the latter firm, a driver, and the working conditions of the employees of Respondent in the appropriate unit. Accordingly, he is found to be within said appropriate unit. The undersigned finds therefore that the above-described unit, which includes the one employee of Woodlawn Dairies constitutes a unit appropriate for the purposes of col-

lective bargaining within the meaning of Section 9 (b) of the Act.[1]

The parties stipulated that the complement of personnel within the appropriate unit totals 42 in number. The General Counsel contends however, and Respondent disputes, that the one employee of Woodlawn Dairies, driver Norman Stathopoulos, should be included in said complement. Having found the unit urged by the General Counsel to be appropriate, the undersigned further finds that Stathopoulos should be included within the unit, this increasing the unit to 43 in number.

As evidence of its majority, the General Counsel proposed to offer in evidence 23 cards bearing the signatures of employees within the aforesaid appropriate unit. Respondent then stipulated that the signatures, which included that of Stathopoulos, were authentic. Other uncontroverted evidence discloses that 18 of these cards were signed at union meetings on June 18, July 1 and July 9, 1952. The testimony indicates that the remaining 5 cards were signed at a Union meeting on July 24. Under the circumstances, the undersigned finds that on July 24, 1952, and at all times thereafter the Union, by virtue of Section 9 (a) of the Act, has been and now is the duly designated representative of a majority of the employees in the above-described unit for the purposes of collective bargaining.

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[1] In the alternative, it is found that a unit solely of the employees of Respondent, excluding the one employee of Woodlawn Dairies, is also appropriate. As will appear, the question of majority representation is unaffected by his inclusion or exclusion.

B. Sequence of events

Insofar as the record indicates, the organizational campaign described below was the first attempt by the Union or any other labor organization to organize the employees of Respondent. Initially, two employees of Respondent became dissatisfied with working conditions and were referred to Business Agent Chester Wuelfken of the Union. Wuelfken distributed some union application and designation forms to one of the men and arranged a meeting for June 18, 1952. On that occasion, he met with some of the employees of Respondent at a hall and outlined union principles and explained organizational procedure; five or six applications were signed at that meeting. A second meeting was held on July 1, at which Wuelfken outlined desirable contract provisions to the assemblage. Other signatures were procured on this occasion, making a total of 13 signed cards.

That Respondent was aware of the organizational campaign became apparent on July 1. Jim Muller, a part owner of Respondent and manager of its maintenance department, asked Employee Clyde Clevenger how the meetings were going. Clevenger replied that they were proceeding satisfactorily and Muller stated that he wished to ascertain the cause of the trouble. Clevender said that the men were not being reimbursed for working overtime; that the drivers assigned to night work, unlike other employees in the concern, did not receive an increase or wage differential; and that the men received no extra pay for working on holidays. Muller replied

that he wished to get to the bottom of the matter and that if Clevenger could ascertain why the men were "insisting they have the union" he would like to know the answer in order to "see if I can iron this out." Muller, who did not recall speaking to Clevenger on this occasion, did not speak to him on the topic again.

On the same day, Muller asked maintenance man Gordon Mills to inspect something in a plant building late in the day and Mills replied that he would not be returning to the plant inasmuch as he had planned to attend the Union meeting that evening. Muller asked Mills to explain the cause of dissatisfaction among the men and Mills replied that there were two main issues, namely the desire of the men for a raise in their hourly rate, or the equivalent thereof, and payment of time and one-half for overtime.

On the following day, Muller asked Mills if he had attended the Union meeting and Mills replied that he had. Muller pointed out that a contract providing for time and one-half for overtime would be too expensive for Respondent. He then stated that Respondent actually needed but one maintenance man; Mills, who was one of the two maintenance men, promptly pointed out that but several days before Muller had informed Mills that he did not know how Respondent could catch up with all the work waiting to be done. Nevertheless Muller stated that "if we have a Union we just can't afford it and we are just going to have to lay off some employees." He

specifically referred to laying off a checker, one Abbie Roe.[2]

On July 5 or within several days thereafter, Muller took still other action to counteract the union organizational campaign, by forming an independent company union. According to Mills, Muller convened a group of workers in the maintenance department and stated that Respondent would like each department to select a representative to meet with management. And, according to the uncontroverted testimony of employee Clyde Clevenger, Foreman Leonard Cable informed him that a committee was to be formed for the purpose of meeting with the stockholders. Muller admitted that he, together with other representatives of management, decided to hold a meeting with the men and that he had proposed to each division that it select representatives to serve on the committee. The employees promptly acceded to this request and a committee was formed with representatives from all divisions of the company; it later met with management on or about July 18.[3]

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[2] The findings herein are based upon Mills' forthright testimony which is substantially uncontroverted by Muller. Muller's testimony on other aspects of Mills' testimony is set forth below and was marked by considerable vagueness and absence of recollection.

[3] Muller testified that Mills suggested the formation of the committee in order to prevent the men from joining the Union. This testimony is somewhat dubious and moreover, even assuming this to be so, the fact still is that Respondent, not Mills proposed this plan to its employees.

On July 9 the Union held a third meeting among the employees of Respondent. It was conducted by Secretary-Treasurer F. T. Baldwin of the Union and about five cards were signed. A similar meeting was held on July 24 at which 5 more cards were signed. On or about July 9, Carroll Lawrence, one of the owners of Respondent, held a conversation with employee Gene Hollenbeck, whose testimony herein is uncontroverted. Hollenbeck explained to Lawrence that he had not been instrumental in introducing the Union to the plant. After some further discussion, Lawrence referred to an employee, Williamson, who was, according to Lawrence, a slow worker; Lawrence then stated that "if they went Union" he did not see how he could "keep a man on and pay him time and a half for the extra work." Lawrence also stated that he had been giving another employee, Abbie Roe, "a break" by keeping him on despite his poor vision and that "the Union would hang on to these men."

On or about July 15, the first contact of management by the Union took place when Secretary-Treasurer Baldwin telephoned Little relative to certain threats allegedly made to the men. At about this time, the Union requested the Idaho Department of Labor to conduct a representation election among the employees of Respondent. And on July 16, the Commissioner of Labor for the State wrote to Respondent and announced that such an election would be conducted on July 18. Respondent was specifically asked to "designate some official of your Company to act as an observer for the Employer. We will

permit the Union to have present one observer." Apparently Respondent did not agree to the holding of the election on July 18 and it was cancelled. The parties later agreed to hold an election on July 26, after the Union threatened to strike.

On or about July 18, at the request of Muller, the Employees' Committee held a meeting with management. Present for Respondent were Muller, Carroll Lawrence, Ralph Little, secretary-treasurer and co-owner of Respondent, and Respondent's counsel, Eli Weston. Gordon Mills, who was selected by the employees as chairman of the Committee, objected at the outset of the meeting to the fact that Respondent had legal counsel present and that the Committee did not; he stated that the employees did not wish Weston to participate in the discussion. Weston promptly excused himself and left. The meeting then commenced with Mills as the spokesman for the Committee and all three representatives of management participating.

The discussion promptly turned to a consideration of what the men wanted to have in a contract; this appears to have been primarily an improvement in hours and time and one-half for overtime work. The management representatives stated that they could not afford to pay more money. Little then stated that it was unlawful to bargain with the Committee while the plant was being organized by the Union but that, according to Mills, "after this is all washed aside we can make some adjustments." Similar language was attributed to Little by Hollenbeck. Muller stated that Respondent was

contemplating abandoning its route to Cascade on the ground that it was not profitable. It is noteworthy that this route was largely a summer route and that this meeting took place in mid-July. It would follow, if Respondent did have any bona fide plans with respect to elimination of this route, that such plans were directed to the future and did not create a current issue. This was the first time the topic was raised with the employees and the choice of this occasion is significant. To the undersigned, the raising of the issue at that time is indicative of Respondent's bad faith. The meeting ended on this note and, will appear, significant improvements in working conditions were made almost immediately after the Union lost the State election on July 26.[4]

On July 18, Secretary-Treasurer Baldwin of the Union officially wrote to Respondent, announced that it represented a majority of its employees in the unit heretofore found to be appropriate, and asked Respondent to meet with the Union and negotiate terms of employment. On July 23, Ralph Little replied to Baldwin and acknowledged receipt of the July 18 demand. Little stated that, prior to recognition, Respondent desired to have the question of majority determined by an election and offered to

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[4] Findings herein are based upon the credited testimony of Mills and Hollenbeck. Muller's testimony concerning the meeting was extremely vague and unimpressive as to details. Little supported Mills' version of events leading up to and during the meeting but denied making the last quoted statement attributed to him by Mills; his denial is not credited.

consent to same. The Union did file a representation petition with the Board on July 21 but it was later withdrawn on August 1. On July 24, the Union held a fourth meeting and voted to strike if Respondent did not consent to an election. This position was conveyed to Respondent's counsel on July 25 by the Union; the consent was forthcoming and an election was agreed to for July 26.

A representative of the State Commissioner of Labor, appeared at the plant and held an election on July 26. He permitted one observer to be present for the Union, Baldwin its secretary-treasurer. And, pursuant to the letter asking Respondent to designate one of its officials as an observer, Ralph Little, co-owner and secretary-treasurer, served as observer. The Union lost the election 23 to 17.

It will be recalled that at the meeting with the Committee on or about July 18 Little informed the Committee that after matters were adjusted Respondent would "make some adjustments." And, shortly before the election, James Muller held a significant conversation with Hollenbeck. After ascertaining from Hollenbeck that the men were dissatisfied because of the overtime they were required to put in on the job, Muller replied that he "thought they would try to work out something for the fellows, they had been planning on it . . . to make up the difference on that overtime." As stated, the Union lost the election on July 26. Respondent within five days instituted a wage increase of $5 per month for all of its employees, effective August 1. This was first reflected in the pay check of August

17 covering the pay roll period of August 1 through 15. At the same time, Hollenbeck's hours and route were reduced despite the increase in his monthly salary.

C. Conclusions

1. The 8 (a) (1) and (2) allegations.

The Union commenced its organizational campaign in June and held its first meeting on June 18. Although no contact was made with management until mid-June, Respondent promptly and understandably became aware of this activity in its plants. Thus, as early as July 1, Manager Jim Muller interrogated Clevenger concerning the progress of the union organizational compaign, asking him to ascertain why the men insisted on having a union, and stated that he wished to "iron out" the difficulty. As demonstrated, Respondent soon took steps to completely by-pass the Union.

On July 2, having been informed on July 1 by Employee Mills that he was attending the July 1 union meeting, Muller informed Mills, a maintenance man, that operation under a union contract would prove to be expensive and that Respondent might have to operate with but one of their maintenance men; this statement overlooked the fact, as Mills promptly informed him, that Muller but several days earlier had commented on the difficulty of catching up with all the work that was to be done. Muller also raised the possibility of the layoff of another employee, a checker. There was no contention by Respondent that it was faced by an economic crisis requiring a reduction in force. Nor is there

any evidence that Respondent had considered discharging these employees prior to the advent of the Union. The undersigned finds therefore that Respondent's statements herein to Clevenger and Mills constituted interrogation of employees and an attempt to coerce its employees by fear of economic reprisals if the Union succeeded in organizing them.

A similar pattern was followed by Co-owner Lawrence, who informed Employee Hollenbeck on July 9 that if the plant "went union" he would have to eliminate a named employee. Lawrence further stated that another named employee had been retained by Respondent despite his poor vision, thus implying that the employee might find his position less secure if the Union organized the plant. Here, too, there is no evidence that elimination of this employee had been contemplated prior to the advent of the Union. The undersigned finds that this statement was also calculated to and inevitably did coerce the employees of the Respondent.

Muller's desire to "iron out" matters took concrete form on July 5 when, in the face of the union organizational campaign, he proposed that the employees form a company union. The employees promptly complied with this request and an employees' committee was formed with representation from all departments.

On July 15, the Union protested to Secretary-Treasurer Little concerning the interrogation of employees. And, on or about the morning of July 16, Respondent was on notice that the State Commission of Labor proposed to conduct an election

among the employees on July 18. Accordingly, on July 18, the Employees' Committee was convened at the request of Muller. He raised the possibility of abandoning one milk route, clearly a threat to the tenure of the driver thereon, and Little informed the assemblage that while Respondent could not bargain with the committee while the plant was being organized, "after this is all washed up we can make some adjustments." These statements by Muller and Little constituted both a threat of reprisal and a promise of benefit, tending to coerce the employees in their choice of a bargaining representative. The Union lost the election held on July 26, at which Secretary-Treasurer Little of Respondent was an observer. Pursuant to Respondent's promise, the employees were promptly granted a wage increase but 5 days later on August 1; furthermore, at least in the case of Hollenbeck, a salaried employee, his work and hours of work were reduced respite his pay increase.

As found, Respondent, on learning of the union organizational campaign, embarked upon a campaign of interrogation and threats of reprisal to the employees if they selected the Union as their representative. Then, in a patent attempt to undermine the union organizational campaign, Respondent proposed the formation of an independent employees' committee, which the undersigned finds constituted a labor organization, to discuss labor relations. Wrought Iron Range Co., 77 NLRB 487.

This committee, referred to herein as Employees' Committee was convened by Respondent on July

18, after Respondent had initially refused to agree to an election and the question of union recognition was still imminent, and the employees were promised improvements in working conditions after the union organizational campaign was disposed of. And a promise of improved working conditions was made shortly before the election to Hollenbeck by Muller. Some days thereafter the employees voted against the Union by a narrow margin in an election at which a company owner improperly served as an observer. Then, true to its promise, Respondent some days later granted a plant-wide wage increase, and improved working conditions for at laest one employee. The evidence is uncontroverted that the wage increase was given solely as a result of the promise given to the Employees' Committee just prior to the election that elimination of the Union from the plant would be suitably rewarded by management. Nor does it make any difference that the wage increase may have been given pursuant to advice that such a procedure was proper after the election. The fact is that the wage increase was promised to the men as an inducement for repudiating the Union, and it is accordingly tainted by this improper motivation.

The undersigned finds that by the foregoing Respondent has dominated and interfered with the formation and administration of a labor organization within the meaning of Section 8 (a) (2) of the Act. This conduct and the other conduct hereinabove found to have been unlawful also constitute interference with, restraint, and coercion of em-

ployees within the meaning of Section 8 (a) (1) of the Act.

2. The 8 (a) (5).

Initially, as to the State election, it may be noted that a State agency cannot usurp the functions of the Board in determining the question concerning the representation of the employees of an employer engaged in commerce. Thayer Co., 99 NLRB No. 65. And while an election by a State agency may, in some circumstances, be an indication of the choice of the employees, such weight may not be attached to it where the clinical conditions uniformly required by the Board have not been followed. It is well established that the Board will not permit a representative of management, and here the facts show that the representative was a co-owner, to serve as an observer at an election. The Board will set aside an election conducted under such circumstances. Burrows and Sanborn, 84 NLRB 304; Parkway Sales, Inc., 84 NLRB 475; and Ann Arbor Press, 88 NLRB 391. It has felt that the presence of such representatives would inevitably have a restraining influence on the freedom of expression of the employees involved and thus destroy the desired laboratory atmosphere for representation elections. And, in any event, the other unfair labor practices described herein would vitiate even a Board election held in this context. Accordingly, the undersigned will not assign any weight herein to the foregoing election and its results.

It has been found that the Union first acquired a majority representation among the employees of

Respondent on July 24. It will be recalled that the initial request for recognition, dated July 18, asked Respondent to bargain concerning working conditions. Respondent, on July 23, wrote to the Union for the first time. This letter, sent from Nampa to the Union office at Boise was presumably delivered on July 24 or 25; it stated that Respondent desired to have the majority question determined by an election. The record is not clear as to whether this letter was before the Union on July 24 when, at a union meeting, it voted to strike on July 26 if Respondent did not consent to an election; the fact that Respondent had on or about July 16 refused to agree to the proposal of the State Labor Commissioner to hold an election on July 18 no doubt played a part in this latter decision. In any event, Secretary-Treasurer Baldwin of the Union telephoned Respondent's counsel on July 25 and informed him that the membership would strike on July 26 unless Respondent agreed to an election. The counsel, Eli Weston, returned the call shortly thereafter and agreed to an election on July 26.

The undersigned is of the belief that the Union, in pressing for an election on July 25, was renewing the request for recognition which Respondent had in effect previously refused to grant absent an election. For originally, the Union had desired recognition presumably with or without a card check; Respondent had in effect refused and proposed an election; and the Union had pressed for the election which Respondent agreed to on July 25. It is apparent that, commencing on July 18 and con-

tinuing thereafter, the Union was primarily interested in recognition and that its consent to the election initially proposed by Respondent did not constitute any alteration of that position. The undersigned finds, therefore, that the demand by the Union on July 25 for the holding of an election was in effect a restatement of its initial request for recognition.

The record discloses that Respondent then unilaterally instituted improvements in working conditions on August 1, but 5 days after the election. This was, however, tainted by the promise made shortly before the election that elimination of the Union would result in an improvement in working conditions. This wage increase is therefore colored by the unlawful motivation that brought it into being and it constitutes evidence of a rejection of the collective bargaining principle. For when the matter is boiled down to bare essentials, Respondent promised employees benefits for rejecting the Union and then delivered such benefits pursuant to its promise.

It is correct that an employer can withhold recognition from a labor organization possessed of a majority and require it to demonstrate its majority through an election where the employer's position is one taken in good faith. Where, however, the refusal to grant recognition is predicated on a desire to utilize the intervening period to disrupt the Union's majority, such refusal is not justified and constitutes a violation of the duty to bargain. Joy Silk Mills, Inc., vs. N.L.R.B., 185 F. 2d 732

(C. A. D. C.) cert. den. 341 U. S. 914; N.L.R.B. vs. Van Kleeck, 189 F. 2d 516 (C. A. 2); and N.L.R.B. vs. Consolidated Machine Tool Corp., 163 F. 2d 376 (C. A. 2) cert. den. 332 U. S. 824.

The fact is that Respondent, upon hearing of the union activities, embarked on a campaign on or about July 1 calculated to coerce the employees to refrain from selecting a collective bargaining representative. It promptly formed a labor organization in the guise of an employee committee; promised improved working conditions in return for elimination of the Union; and upon elimination of the Union, did promptly give employees a wage increase. This demonstrates that Respondent's proposal of and assent to the election were not motivated by a bona fide doubt as to the Union's majority and, under the circumstances, the State election following upon these unfair labor practices calculated to coerce employees in the selection of a bargaining representative and conducted under improper conditions, cannot be of avail to Respondent. See Franks Bros. vs. N.L.R.B., 321 U. S. 702.

That Respondent may have received advice that it was permissible to grant these wage increases under the circumstances, does not serve to refute the preponderance of the evidence that these wage increases were unlawfully motivated. These increases were intended by Respondent as its reply to the Union's desire to bargain collectively. Under the circumstances, the undersigned finds that on and after August 1, 1952, Respondent had refused to bargain collectively with the Union as the collective

bargaining representative of its employees, thereby violating Section 8 (a) (5) and 8 (a) (1) of the Act. N.L.R.B. vs. W. T. Grant Co., .. **F. 2d** .. (C. A. 9), decided November 10, 1952.

IV. The effect of the unfair labor practices upon commerce

The activities of Respondent, set forth in Section III above, occurring in connection with its business operations described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The remedy

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

In the view of the undersigned, the unfair labor practices found above warrant an inference that the commission of other unfair labor practices may be anticipated in the future. It will therefore be recommended that Respondent be ordered to cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by the Act.

Upon the basis of the foregoing finding of fact, and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

2. Respondent's inside plant employees, drivers, salesmen, outside drivers, and milk haulers, excluding managers, assistant managers, superintendents, office and clerical employees, foremen, guards, and special employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.[5]

3. Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, was on July 24, 1952, and now is, the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on August 1, 1952, and at all times thereafter, to bargain collectively with the Union as the exclusive representative of the employees in the aforesaid appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor prac-

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[5] This unit of course includes the driver for Woodlawn Dairies.

tices within the meaning of Section 8 (a) (1) of the Act.

6. By dominating and interfering with the formation and administration of a labor organization, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (2) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that Respondent, Home Dairies Company, Nampa and Caldwell, Idaho, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, as the exclusive representative of its inside plant employees, drivers, salesmen, outside drivers, and milk haulers, excluding managers, assistant managers, superintendents, office and clerical employees, foremen, guards, and special employees;

(b) Dominating or interfering with the formation and administration of Employees' Committee or any other labor organization;

(c) Recognizing the Employees' Committee, or any successor thereto as the representative of its employees for the purpose of dealing with it con-

cerning grievances, wages, rates of pay, hours of employment, or any other conditions of employment;

(d) In any manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization, as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, as the exclusive representative of all employees in the above-described appropriate unit, with respect to wages, rates of pay, hours of employment, or other conditions of employment, and, if an understanding is reached, embody such understanding in a written agreement;

(b) Disestablish and withdraw all recognition from Employees' Committee as the representative of its employees for the purpose of dealing with Respondent concerning grievances, wages, rates of

pay, hours of employment, or any other conditions of employment;

(c) Post at its places of business at Nampa and Caldwell, Idaho, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being signed by a representative of Respondent, be posted immediately upon receipt thereof and maintained for sixty (60) consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region in writing within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps it has taken to comply herewith.

It is also recommended that unless on or before twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order Respondent notifies the aforesaid Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent to take the aforesaid action.

Dated this 15th day of December, 1952.

/s/ MARTIN S. BENNETT,
Trial Examiner.

APPENDIX A

Notice to all employees pursuant to the recommendations of a trial examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will bargain collectively, upon request, with Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, as the exclusive representative of our employees in the bargaining unit described below with respect to wages, rates of pay, hours of employment, or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All inside plant employees, drivers, salesmen, outside drivers, and milk haulers, excluding managers, assistant managers, superintendents, office and clerical employees, foremen, guards, and special employees.

We Will disestablish and withdraw all recognition from Employees' Committee as the representative of any of our employees for the purpose of dealing with us concerning grievances, wages, rates of pay, hours of employment, or other conditions of employment.

We Will Not dominate or interfere with the formation or administration of Employees' Committee or any other labor organization.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8 (a) (3) of the Act.

All of our employees are free to become or remain members of the above-named union or of any other labor organization.

Dated.....

HOME DAIRIES COMPANY,
(Employer)

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

EXCEPTIONS

The respondent in the above entitled case files herewith Exceptions and Brief to the Intermediate Report and Recommended Order upon the following grounds to wit:

I.

There is no evidence in the record to sustain a finding that the Union had been voluntarily elected as the representative of the majority of the respondent's employees.

II.

The evidence fails to support the conclusion that the respondent engaged in any unfair labor practices or any program designed to interfere with its employees in their right to join or not to join the Union.

III.

There is no evidence in the record to support the conclusion that the respondent established a company dominated committee.

IV.

There is no evidence in the record to support the conclusion that the election was consented to upon a threat of strike.

V.

The record fails to support the conclusion that wage and salary increases were made for the purpose of interfering with the Union's activities.

VI.

The record clearly shows and establishes the fact that the Union decided that the question of representation was to be established through an election among respondent's employees to be conducted by the Commissioner of Labor of the State of Idaho.
* * * * *

Respectfully submitted,

HOME DAIRIES COMPANY
/s/ ELI A. WESTON,
Attorney for Respondent.
Residence: Boise, Idaho.

United States of America
Before the National Labor Relations Board

Case No. 19-CA-691

In the Matter of HOME DAIRIES COMPANY

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL No. 483, AFL

DECISION AND ORDER

On December 15, 1952, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent has engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirma-

tive action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the modifications and exceptions set forth below.

As set forth in detail in the Intermediate Report, the Union first claimed recognition as bargaining agent on July 18, before it had acquired a majority. The Respondent replied on July 23, and said that it desired to have the question of representation determined by an election. The Union achieved majority status for the first time on July 24, when the members decided to strike unless the Respondent agreed to an election. The following day the Union and the Respondent agreed to a State-conducted election, which took place on July 26, and which the Union lost. It does not appear that after acquiring a majority the Union made any demand upon the Employer other than the request for a consent election.

The Trial Examiner found that, although the Union did not represent a majority of the employees until after the Respondent had already refused to

grant exclusive recognition, the Respondent nevertheless violated Section 8 (a) (5) of the Act, as alleged in the complaint. We do not agree. As the Board has frequently held, an unequivocal demand for recognition at a time when the union has a majority in an appropriate unit is a prerequisite to a finding that there was an unlawful refusal to bargain.[1] It is true that by other conduct—including interrogations, promises of benefit, and establishment of an employee committee to supplant the Union—the Respondent unlawfully coerced and intimidated its employees and thereby interfered with the Union's organizational activity. It does not follow, however, that the Respondent's various violations of Section 8 (a) (1) and (2) of the Act, all of which occurred before the Union had reached its majority, can be deemed also to constitute a violation of Section 8 (a) (5).

Accordingly, as neither a demand nor a refusal were proved at a time when the Union in fact repsented a majority, we find that the record does not support the complaint allegation of refusal to bargain, and we shall therefore dismiss the complaint insofar as it alleges a violation of Section 8 (a) (5) of the Act.[2]

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations

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[1] Wafford Cabinet Company, 95 NLRB 1407.

[2] Sam Zall Milling Company, 94 NLRB 749, Reversed, 31 LRRM 2514 (C.A. 9), March 17, 1953.

Act, the National Labor Relations Board hereby orders that Respondent, Home Dairies Company, Nampa and Caldwell, Idaho, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Dominating or interfering with the formation and administration of Employees' Committee or any other labor organization;

(b) Recognizing the Employees' Committee, or any successor thereto as the representative of its employees for the purpose of dealing with it concerning grievances, wages, rates of pay, hours of employment, or any other conditions of employment;

(c) In any manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization, as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Disestablish and withdraw all recognition from Employees' Committee as the representative of its employees for the purpose of dealing with Respondent concerning grievances, wages, rates of pay, hours of employment, or any other conditions of employment;

(b) Post at its places of business at Nampa and Caldwell, Idaho, copies of the notice attached hereto and marked Appendix A.[3] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being signed by a representative of Respondent, be posted immediately upon receipt thereof and maintained for sixty (60) consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(c) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the date of this Order what steps it has taken to comply herewith.

3. It Is Further Ordered that the complaint be, and it hereby is dismissed insofar as it alleges that

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[3] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order" the words "A Decree of the United States Court of Appeals enforcing."

the Respondent violated Section 8 (a) (5) of the Act.

Signed at Washington, D. C., June 3, 1953.

PAUL M. HERZOG, Chairman,
JOHN M. HOUSTON, Member,
PAUL L. STYLES, Member,
ABE MURDOCK, Member,
IVAR H. PETERSON, Member.

[Seal] NATIONAL LABOR RELATIONS BOARD.

APPENDIX A

Notice to all employees pursuant to a decision and order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will disestablish and withdraw all recognition from Employees' Committee as the representative of any of our employees for the purpose of dealing with us concerning grievances, wages, rates of pay, hours of employment, or other conditions of employment.

We Will Not dominate or interfere with the formation or administration of Employees' Committee or any other labor organization.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organi-

zations, to join or assist Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8 (a) (3) of the Act.

All of our employees are free to become or remain members of the above-named union or of any other labor organization.

HOME DAIRIES COMPANY,
(Employer)

By.....
(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HOME DAIRIES COMPANY,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "In the Matter of Home Dairies Company and Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL," the same being known as Case No. 19-CA-691 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Martin S. Bennett Trial Examiner for the National Labor Relations Board issued November 3, 1952.

(2) Stenographic transcript of testimony taken before Trial Examiner Martin S. Bennett on November 3, 1952, together with all exhibits introduced in evidence.

(3) Copy of Trial Examiner Martin S. Bennett's Intermediate Report and Recommended Order dated December 15, 1952 (annexed to item 7 hereof); order transferring case to the Board, dated December 15, 1952, together with affidavit of service and United States Post Office return receipts thereof.

(4) Respondent's letter dated December 22, 1952, requesting extension of time to file Exceptions and Brief.

(5) Copy of Board's telegram dated December 29, 1952, granting all parties extension of time to file Exceptions and Briefs.

(6) Respondent Company's Exceptions to the Intermediate Report received January 15, 1953.

(7) Copy of Decision and Order issued by the National Labor Relations Board on June 3, 1953, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor

Relations Board in the city of Washington, District of Columbia, this 22nd day of September, 1953.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board.

[Endorsed]: No. 14039. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Home Dairies Company, Respondent. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed: September 24, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14039

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HOME DAIRIES COMPANY,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 141, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Home Dairies Company, Nampa and Caldwell, Idaho, its officers, agents, successors, and assigns. The proceeding resulting in said Order is known upon the records of the Board as "In the Matter of Home Dairies Company and Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL.," Case No. 19-CA-691. In support of this petition the Board respectfully shows:

(1) Respondent is an Idaho Corporation engaged in business in the State of Idaho, within this judi-

cial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on June 3, 1953, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, Home Dairies Company, Nampa and Caldwell, Idaho, its officers, agents, successors, and assigns. On the same date, June 3, 1953, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing those sections of the Board's said Order which

relate specifically to the Respondent herein, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

Dated at Washington, D. C., this 16th day of September, 1953.

NATIONAL LABOR RELATIONS BOARD

/s/ By A. NORMAN SOMERS,
Assistant General Counsel.

[Endorsed]: Filed September 18, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

In this proceeding, petitioner National Labor Relations Board will urge and rely upon the following points:

1. Substantial evidence on the record considered as a whole supports the Board's finding that respondent violated Section 8 (a) (1) of the Act by interrogating its employees, threatening reprisal, promising benefits, and granting a wage increase to thwart the employees concerted activity.

2. Substantial evidence on the record considered as a whole supports the Board's finding that respondent violated Section 8 (a) (2) and (1) of the Act by dominating and interfering with the forma-

tion and administration of the Employees' Committee.

Dated at Washington, D. C., this 22nd day of September, 1953.

Respectfully submitted,

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board.

[Endorsed]: Filed September 25, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ANSWER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the Home Dairies Company, Respondent in the above entitled action, and for its Answer to the Petition for Enforcement denies each and every allegation contained therein except as hereinafter admitted, qualified or explained.

I.

Respondent admits that it is an Idaho corporation engaged in business in the State of Idaho within the judicial circuit of this Court and therefore under its jurisdiction and Respondent admits that a proceeding was held before the Board and that the Board's Decision and Order was duly served upon Respondent as stated in paragraph (2) of the Petition.

II.

Respondent denies that it has violated Sections 8(a)(1) or 8(a)(2) of the Act and specifically denies that it has interfered with, restrained or coerced its employees in the exercise of their rights under the Act. Respondent states that any statements made to, or conversation with, its employees did not interfere with the employees' rights to join or not to join a labor organization and that any statements made by the Respondent were expressions of opinion and contained no threats or promises whatsoever.

III.

Respondent states that pursuant to a voluntary agreement made and entered into by and between the Respondent and the representative of the union, the union agreed to an election to be conducted by the Commissioner of Labor for the State of Idaho. The election was conducted and the union failed to receive a majority of the votes and this Respondent was then and there informed that the matter was disposed of for a period of one year, but in spite of said election, and contrary to the agreement for the same, the Board conducted the hearing referred to in Paragraph (2) of the Petitioner's Petition, and contrary to the agreement between the parties, and in direct violation thereof, issued an Order ordering the Respondent to bargain with the union.

IV.

Respondent further alleges that the union at no time legally represented a majority of the Respondent's employees.

Wherefore, Respondent asks that the Petition in the above entitled action be dismissed.

Dated at Boise, Idaho, this 6th day of October, 1953.

HOME DAIRIES COMPANY
/s/ By E. A. WESTON,
Attorney for Respondent.

[Endorsed]: Filed October 12, 1953. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-691

In the Matter of HOME DAIRIES COMPANY,
and
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL No. 483, A.F.L.

TRANSCRIPT OF TESTIMONY

Civil Service Room, U. S. Post Office Building, Nampa, Idaho, Monday, November 3, 1952.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock, a.m.

Before Martin S. Bennett, Esq., Trial Examiner.

Appearances: Paul E. Weil, Esq., 407 U. S. Courthouse, Seattle, Washington, appearing on behalf of the National Labor Relations Board. F. T.

Baldwin, Secretary, 613 Idaho Street, Room 201, Boise, Idaho, appearing on behalf of the Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, A.F.L., the Petitioner. Eli A. Weston, Esq., Box 1922, Boise, Idaho, appearing on behalf of the Home Dairies Company, the Respondent. [1*]

* * * * *

Mr. Weil: Mr. Examiner, I move at this time to amend the complaint in the following particulars:

Between paragraph IV and paragraph V, the following paragraph is to be inserted:

"On or about July 18, 1952, and at all times since the union has been the exclusive bargaining representative of the employees in the unit described above in paragraph IV, within the meaning of Section 9 (a) of the Act."

In paragraph X——

Trial Examiner Bennett (interrupting): Do you have a number for that?

Mr. Weil: We will number that IV (a), I think that will be easier.

Trial Examiner Bennett: All right.

Mr. Weil: In paragraph X, the first phrase, after the words "paragraph V," insert the numbers "VI" and "VII."

Trial Examiner Bennett: So it will read "V, VI, and VII"?

Mr. Weil: That is right.

In paragraph XII, the phrase, "as set forth in

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* Page numbering appearing at top of page of original Reporter's Transcript of Record.

paragraphs V, VI, VII, and VIII," should be amended to "as set forth in paragraphs V, VI, and VII," paragraph VIII being the descriptive paragraph. [6]

Trial Examiner Bennett: Is that the extent of the motion?

Mr. Weil: I further wish to — Mr. Weston, would you like to move yourself to amend this answer to Section 1?

Trial Examiner Bennett: You mean move to have the answer extend to the complaint as amended?

Mr. Weil: No. There is a typographical error in paragraph I of the answer, "Section 3" should read "Section 2".

Mr. Weston: I will wait until you get through with yours. I have two or three other ones.

Trial Examiner Bennett: Does the respondent have any objection?

Mr. Weston: The respondent has no objection, if the answer will constitute a general denial to these amendments, any answer will be consistent to these amendments, unless it is understood that we deny each of the amendments as made. Otherwise, no objection.

Trial Examiner Bennett: All right, the motion is granted with that understanding.

Mr. Weston: The respondent would like to ask to amend its answer by inserting in paragraph I after the word "section" in the sixth line, the words "sub-paragraph 3 of Section 2."

Trial Examiner Bennett: So that will read "2 (3)?

Mr. Weston: Right.

Trial Examiner Bennett: Is that the extent of the motion?

Mr. Weston: Yes, sir. [7]

Trial Examiner Bennett: Any objection?

Mr. Weil: No, sir.

Trial Examiner Bennett: The motion is granted.

Mr. Weil: I wish to propose a stipulation as to commerce to read as follows:

"In the course of its business respondent during the twelve-month period preceding July 1952, made total purchases having a value of approximately $750,000, of which an amount of approximately $112,500 was purchased from sources outside the State of Idaho; during the same period respondent made sales of products valued at approximately $112,500, all of which sales were shipped directly to customers outside the State of Idaho."

That is all.

Mr. Weston: That is agreeable to us.

Trial Examiner Bennett: So stipulated.

Mr. Weil: Will counsel stipulate that the employees in the instant affair are not agricultural laborers?

Mr. Weston: Yes, we will stipulate that.

Mr. Weil: I wish to call at this time Mr. Wuelfken.

CHESTER ARNOLD WUELFKEN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): Would you give us your name and your address?

A. My name is Chester Arnold Wuelfken. I live at 313 Everett [8] street, Caldwell.

Q. What is your occupation, Mr. Wuelfken?

A. I am business agent for the Teamsters Local 483 in Boise, Idaho.

Q. In the course of your duties as business agent, have you had any contact with employees of Home Dairies Company? A. Yes, I have.

Q. What was your first contact with the employees of Home Dairies?

A. I received two names of employees who were looking for me with the idea of organizing the place, the Home Dairies Company, I should say.

Q. (By Trial Examiner Bennett): When was this?

A. It was in the first half of June, somewhere between the 6th and the 16th. I don't know the exact date.

Q. (By Mr. Weil): Who were the two individuals?

A. Gene Hollenbeck and Sherman Clay were the two names that I received.

Q. Did you subsequently contact either one of these gentlemen?

(Testimony of Chester Arnold Wuelfken.)

A. Yes. I believe it was on the 12th of June, at least the second Thursday, I am not sure of the exact date. I saw Sherman Clay at that time.

Q. Did you make any arrangements with Mr. Clay?

A. Yes. I told him that if the——

Q. (By Mr. Weston—interrupting): His name is Call—— [9]

A. (Interrupting): That is right, it is Sherman Call. Pardon me.

Q. (By Trial Examiner Bennett): How is it spelled? A. C-a-l-l, I believe.

I told him that the union would make arrangements to have a hall so that we could have a meeting with the employees of the company if they so desired, and he said that they would like to have that meeting, and so the arrangements were for myself to get the hall and then contact Mr. Call so that he could notify the other fellows of the time the meeting would be held. That was the 18th of June, I believe, that they called for it.

Q. (By Mr. Weil): Did you hold a meeting on the 18th of June?

A. Yes, at the Nampa Labor Temple at 8 o'clock. That was on, I believe, it was Wednesday, Wednesday, the 18th.

Trial Examiner Bennett: Don't look at anything unless counsel asks you to.

The Witness: I am sorry.

Q. (By Mr. Weil): Tell us what transpired at this meeting, if you will, as much as you remember?

(Testimony of Chester Arnold Wuelfken.)

A. Well, at the first meeting Sherman Call wasn't there, the other fellows that were there told me that he had already quit the job and left, although he had notified them of the meeting, so at the first meeting I outlined the procedures of organization and gave a general talk on the union principles and what we would have to do to organize the Home Dairies. They asked various [10] questions on organization and along that general line, and then toward the close of the meeting I passed out the applications with the bargaining authorizations on the bottom to be signed, and one of the gentlemen at the meeting came forward and said that he couldn't sign at that time because he was a foreman at the Caldwell plant. I don't remember his exact name. His first name, I believe, was Roy. I can give a good description of him, if you would like it.

Q. (By Trial Examiner Bennett): In other words, the other people were people from the Nampa plant?

A. Yes, the other employees were from the Nampa plant and the other one from Caldwell was there, he was a supervisor, until that time I didn't know him——

Q. (Interrupting): You have answered the question.

Q. (By Mr. Weil): You distributed these application blanks. Were any of them signed at this meeting?

(Testimony of Chester Arnold Wuelfken.)

A. Yes. I believe there were five or six signed at that meeting.

Q. What did you do with these application blanks?

A. I filed them in a folder down at the Boise office.

Q. Who is in charge of the Boise office, who would have charge of that folder?

A. Well, the secretary, Frank Baldwin, would have charge of it.

Q. While you were organizing these men, did you have any further meetings after the meeting of the 18th? [11]

A. Yes. I set up another meeting with them for, I believe July 1, at the Nampa Labor Temple, which was also at 8 o'clock.

Q. Could you tell us if you remember what happened at that meeting?

A. Well, there was a larger group in attendance at the second meeting, and they wanted besides the general information on how to organize, they wanted to know various things about contracts we had negotiated with other creameries in the area, and how close we could come to those various contracts we already held in negotiating one for them, and toward the end of the meeting we filled out applications for the men who had previously, I should say, hadn't been in attendance previously. There was 13 at the end of that meeting, that had signed up.

(Testimony of Chester Arnold Wuelfken.)

Q. (By Trial Examiner Bennett): Thirteen additional?

A. No, 13 altogether, I believe. Approximately seven at that meeting signed up, that would be a total of 13 at that time.

Q. (By Mr. Weil): Those additional applications, what did you do with them?

A. I filed them with the first applications in the Boise office.

Q. Did you at any time contact the management of the company?

A. No. Not at that time.

Q. Did you at a later time?

A. I don't believe that I ever contacted the management.

Q. Did you have any further meetings, after the meeting of the first? [12]

A. Yes. I set up two further meetings, one for, I believe, it was the 9th of July, and then a special meeting I set up for, I believe, it was the 24th of July, and both of those were also in the Nampa Labor Temple.

* * * * *

Cross-Examination

Q. (By Mr. Weston): How did you get your first notice from some employees at the Home Dairies that they wanted to organize?

A. Through the Boise office, I was handed a slip by the secretary with the two names on it.

Q. Did you get it through the mail or did Mr. Baldwin call you?

(Testimony of Chester Arnold Wuelfken.)

A. I was in the office at that time.

Q. What did Baldwin tell you then? [13]

A. He told me there were a couple of fellows who wanted to contact the business agent of the union to be organized, with the idea in mind of organizing the company.

Q. Did he hand you a slip with two names on it?

A. Yes, sir, a small slip of paper with two names on it.

Q. Was that Mr. Baldwin's handwriting or was the slip signed by the employees?

A. No, that was Mr. Baldwin's handwriting on the slip of paper at that time.

Q. Did Mr. Baldwin tell you how he first got notice that the employees wanted to organize at Home Dairies?

A. I think it come over the telephone, but I don't remember who he told me phoned it in.

Q. Isn't it a matter of fact that Mr. Shaw of the Wage and Hour office called him first?

A. I wouldn't know that. I didn't answer the phone.

Q. You don't know how he got the first notice?

A. No, I don't.

Q. Then you contacted Mr. Hollenbeck and Mr. Call, is that right?

A. No, I didn't contact Hollenbeck. I contacted Sherman Call.

Q. (By Trial Examiner Bennett): You saw him in person, did you?

A. I saw him in person, yes.

(Testimony of Chester Arnold Wuelfken.)

Q. (By Mr. Weston): Did you give him some application blanks? [14] A. That is right.

Q. Did you give Mr. Hollenbeck some application blanks?

A. Well, not at that time. I don't know, I gave some application blanks out later on, but I don't remember exactly who they were to.

Q. So after receiving notice that two employees wanted union organization, then you called the meeting and the first meeting was June 18, is that right?

A. I believe that is the correct date.

Q. About how many did you have at that meeting?

A. The first meeting, approximately seven, somewhere in that, within one or two of that.

* * * * * [15]

Q. At either of these meetings, did you or Mr. Mills or anyone else tell them if they joined at that time it would cost five dollars, and if they joined later on it would cost twenty-five dollars?

A. I believe they asked what the initiation fee was and I told them that on, in organizing a new plant, we usually put a five dollar initiation fee on, the original organization.

Q. But if they joined later on, if they got a contract, it would cost $25, is that right?

A. Additional members, at a later time.

Q. In other words, you were making a special deal for those that came in at that time?

A. A new organization, in other words. * * * * *

F. T. BALDWIN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): Will you give us your name and address, Mr. [17] Baldwin?

A. F. T. Baldwin, 613 Idaho Street, Room 201, Boise, Idaho.

Q. What is your occupation, Mr. Baldwin?

A. Secretary-treasurer of Local 483, Teamsters Union, A.F.L.

Q. In that office of secretary-treasurer, do you have the duties of keeping the records submitted to the Boise office by the business agents in the field? A. Yes.

Q. Are they kept under your direct control?

A. Yes.

Q. Do you further have any duties as far as organizing employees, is concerned?

A. Well, yes, usually after they have had one or two meetings I go in and help them get organized.

Q. Did you have any such contact with Home Dairies Company? A. Employees, you mean?

Q. Yes. A. Yes.

Q. When did you first help out, Mr. Baldwin?

A. The first meeting I attended was on about the 9th of July, and then on the 24th of July.

Q. On the meeting of the 9th, at that meeting, was Mr. Wuelfken there?

(Testimony of F. T. Baldwin.)

A. No, I don't believe he was that night.

Q. You took over that meeting in his place? [18]

A. Yes. He had another meeting.

Q. You conducted that meeting?

A. That is right.

Q. Were there many individuals there?

A. There was quite a crowd. I wouldn't know exactly how many. There was quite a bunch there, though.

Q. By quite a bunch, what do you mean, 10, 20, 30?

A. Oh, I would imagine there was around 20.

Q. Did you have any additional persons sign application blanks at this meeting?

A. We distributed some that night and there was some taken out. They were signed that night, and also there was some given out that were signed later.

Q. I see. How many were signed that night, approximately? A. Pardon me?

Q. About how many were signed that night?

A. I think five.

Q. Do you have any idea about how many, approximately, were signed later?

A. Five. There was a total of ten signed by the night of the 24th.

Q. I see. That is ten in addition to those of which Mr. Wuelfken spoke?

A. Ten in addition to the thirteen we already had signed.

Q. What did you do with the applications? [19]

(Testimony of F. T. Baldwin.)

A. Put them in a file in our office.

Q. Was that together with the applications that Mr. Wuelfken turned over to you? A. Yes.

Q. Are these the applications about which we have been talking (indicating)? A. Yes.

Q. How many applications are there?

A. Twenty-three.

* * * * * [20]

Q. (By Mr. Weil): Showing you General Counsel's proposed exhibits 2-A through 2-W, the signatures appearing on those, on most of those applications, are obviously in a different penmanship than the dates that appear thereon. Can you explain that, Mr. Baldwin?

A. Well, the dates on the 7th and 9th I put in myself. The employees involved signed the applications themselves. They filled out the bargaining portion of the application, signed the top and bottom portion and also the back, on the information we need, their occupation, wage scale and also their beneficiary in case of death.

Q. Their signature on these is necessary for this insurance policy to become effective, is that correct? A. That is right.

* * * * * [21]

Q. (By Mr. Weston): Did you see these signed yourself?

A. The ones that were signed at the meeting in which I was present, yes. I didn't see the other signed.

(Testimony of F. T. Baldwin.)

Q. Do you know which ones exactly they are?

A. No.

Q. Did you put this date "7" and "9" on here?

A. Yes.

Q. Did you ask them when they signed them?

A. I asked them if it was agreeable we used that date and they said yes, the first meeting they attended.

Q. They gave you their permission to put the date on them? A. Yes.

Q. (By Trial Examiner Bennett): You said five cards were signed July 9?

A. And five the 24th, I believe that is correct.

Q. (By Mr. Weston): You don't know which five they are?

A. No, I have no way of knowing. In an organization of a new plant, it is, you are not acquainted with the employees involved and it is utterly impossible to tell which one is which, and in the course of organizing we hand out the applications and the employee, we tell him what it means, the back and how to sign it, the back and so on and so forth, where to sign it, it would be utterly impossible to tell who signed which ones and so forth, in a meeting where there is——

* * * * * [22]

Q. (By Mr. Weil): Did you at any time write a letter to the company requesting them to bargain with the union? A. Yes.

Q. Is this a copy of that?

(Testimony of F. T. Baldwin.)

A. Yes. [24]

Mr. Weil: Will counsel stipulate that this is a true copy?

Mr. Weston: We will stipulate that that is a true copy.

Mr. Weil: I would like to have this marked as General Counsel's proposed 3.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3, for identification.)

Q. (By Mr. Weil): Did you mail the original of that? A. Yes.

Q. How did you address it?

A. We sent it to J. M. Muller, manager, by registered mail, receipt requested.

Q. What is the card attached?

A. That is just a return receipt, showing that someone signed it there at the creamery.

Mr. Weil: I would like to offer that letter and the receipt attached as General Counsel's 3.

Trial Examiner Bennett: Is there any objection?

Mr. Weston: What did you say it was attached to. What did you say was attached to it?

Mr. Weil: The receipt, return receipt.

Mr. Weston: No objection.

Trial Examiner Bennett: Admitted.

(The document heretofore marked General Counsel's Exhibit No. 3, for identification, was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 3

Registered July 18, 1952

Mr. J. M. Muller, Manager
Home Dairies
424 12th Avenue North
Nampa, Idaho
Home Dairies

Dear Sir:

This is to advise you that this union represents a majority of your employees in the following appropriate unit:

all inside workers
all outside salesmen
all driver salesmen
all drivers hauling milk that are on the company's regular payroll.

This is a demand that you bargain with this union concerning rates that pay, hours and conditions of employment. Please set the earliest date that we can meet to negotiate.

You are also informed that in the event this union takes further action, whatever its form, such action does not constitute a waiver of its claims of majority status and this demand for bargaining. Thank you very much in advance. I am,
Yours truly,

F. T. BALDWIN,
Sec.-Treas.

FTB:jo

Return Receipt attached.

(Testimony of F. T. Baldwin.)

Q. (By Mr. Weil): Did you receive any answer to this letter? A. Yes.

Q. When?

A. It was about four or five days later, I think, around the 21st.

Q. Before you received the answer, did you have any, take any, further steps, in regard to this organization? A. What do you mean?

Q. Did you speak to any officials of the company?

A. I called on the telephone, talked to Mr. Little one morning, yes.

Q. What did you talk about?

A. Well, I told him that the information I had received, that some of the employees were being threatened and so on and so forth, and prevailed upon him not to do it if it was true, and he said that he wasn't doing it, and he didn't think the company was.

Q. Did you discuss an election at that time?

A. With him, no.

Q. When did you first discuss an election?

A. I discussed it with the labor commissioner, the State of Idaho, the labor commissioner, on the 16th, I think he called me and said that he was putting up an election notice.

Q. Who is this labor commissioner?

A. Well, the labor commissioner of the State of Idaho. [26]

Q. Is that Mr. Thompson? A. Robinson.

Q. Robinson? A. Yes.

(Testimony of F. T. Baldwin.)

Q. How did it happen that he was putting that up? Had you requested an election?

A. We had talked about that date and he had called and asked if that date was satisfactory and I told him yes, the date was satisfactory.

Trial Examiner Bennett: I would like to see these dates pinpointed a little more in these conversations.

Q. (By Mr. Weil): When did you first contact the labor commissioner in regard to having an—don't check your records—if you remember — an approximate date?

A. Well, I talked to him on July 16. At that time he said he was putting up, going over to put up a notice of election, to be held the 18th.

Q. Had you contacted him before that time?

A. The labor commissioner?

Q. Yes.

A. I believe a day or two ahead of that, yes, I had. That would be about the 15th, 14th or 15th, that he had suggested this date and asked if it was agreeable to us and we told him yes.

Q. (By Trial Examiner Bennett): You sent this letter on July 18, the one that is marked No. 3?

A. Yes.

Q. You said you telephoned Mr. Muller?

A. Mr. Little, I didn't talk to Mr. Muller. I talked to Mr. Little.

Q. To Mr. Little? A. Yes.

Q. When did you speak to him with relation to this letter?

(Testimony of F. T. Baldwin.)

A. Before I sent this letter here——

Q. (Interrupting): You telephoned him about these alleged threats?

A. Yes, that is right.

Q. How long before July 18?

A. I would say two or three days ahead of that, probably July 15, I don't remember, somewhere around there, not the exact date.

Q. Do you know his title with the company?

A. Not then, no.

Q. Do you know it now?

A. I understand he is secretary of the company or office manager.

Trial Examiner Bennett: That is all I have at this time.

Q. (By Mr. Weil): Did you petition the State Labor Board to run an election?

A. Yes, it was our understanding that the State Labor Board could hold an election the same as the National Labor Relations Board, and I talked to their attorney, Eli Weston, about it, just [28] in an offhand manner and I think Mr. Weston can probably bear it out that he also talked to the labor commissioner, at least that is the information I got from the labor commissioner.

Q. On that basis the commissioner called you and said he was in the process of putting up—what else did he say?

A. Well, he put the notice up and then the election was to be held the 18th and then it was post-

(Testimony of F. T. Baldwin.)

poned and I called him immediately and asked him why.

Q. How did you learn that it was postponed?

A. Some of the employees called me at home and wanted to know how come the election wasn't held and I called him and told him, I called him and he said the company wouldn't agree to the labor commissioner holding it.

Q. That was on what date?

A. The date was supposed to be 18th, that the election was held.

Q. Were you called immediately when the election was not held, or——

A. (Interrupting): Yes, that evening at home.

Q. That would have been the evening of the 18th? A. The 18th, yes.

Q. Was that prior to the time that you had sent this letter?

A. No. I sent it out on the morning of the 18th.

Q. The morning of the 18th? A. Yes.

Q. Did you get in touch with anyone representing the company to find out about why the election hadn't been held?

A. No. I only talked to the labor commissioner.

Q. What was your next contact with anyone representing the company?

A. I didn't have another contact with them.

Q. Until when?

A. Well, the day of the election, the day the election was finally held, on the 26th, I think, was the next date.

(Testimony of F. T. Baldwin.)

Q. You had no contact with them, except for sending the General Counsel's Exhibit No. 3 and receiving this answer, is that right?

A. That is right, yes.

Mr. Weil: Will you mark that General Counsel's 4, please.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 4 for identification.)

Q. (By Mr. Weil): Handing you General Counsel's Exhibit No. 4, is that the answer you received?

A. Yes.

Mr. Weil: I would like to propose that that be admitted into evidence.

Trial Examiner Bennett: Is there any objection?

Mr. Weston: No objection.

Trial Examiner Bennett: It may be admitted.

(The document heretofore marked [30] General Counsel's Exhibit 4 for identification, was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 4

[Home Dairies Letterhead]

Mr. F. T. Baldwin, Sec.-Treas. July 23, 1952
Local No. 483
Room 202, Labor Temple, Boise, Idaho.

Dear Sir:

We have your letter dated July 18 in which you demand that we bargain through your Local for

rates of pay, hours and working conditions for our employees.

Before we recognize your Union as the bargaining representative we would like to have this question determined by an election, and for your information we are willing to consent to the election providing the unit for bargaining purposes is appropriately determined.

We have been advised that an election may be requested either by the Union or the employer, and we suggest in this case that you file a petition and notify us accordingly.

Very truly yours,

HOME DAIRIES

RLL/eb /s/ RALPH L. LITTLE

Q. (By Mr. Weil): When did you—this election was to have been held on the 18th?

A. That is right.

Q. When did you next meet with the employees of the company after that?

A. On the 24th.

Q. What happened at that meeting?

A. Well, they were disappointed because the election hadn't been held and they were deciding on walking out the following Saturday unless the company agreed to the election. They were talking about it, discussing it amongst themselves.

Q. Did you take any part in the discussion?

A. Yes, I did.

(Testimony of F. T. Baldwin.)

Q. What was the final decision?

A. Well, the decision was that we would call Mr. Weston, write and tell him that unless something happened there, that the employees were going to walk out, which I did, I called him on Friday, the following Friday.

Q. What did Mr. Weston answer?

A. He then said they would agree to an election to be held by the labor commissioner.

Q. Did he answer that at the same time or did he call you back?

A. Well, he, I think, he called back a little later, if my [31] memory serves me right, and said they would agree to an election held by the labor commissioner.

Q. What did you do then?

A. They held the election on the 26th, then.

Q. Did you contact the labor commissioner yourself?

A. I told him that it had been changed, they would agree to an election, and then he set it up for the 26th, I suppose after checking with Mr. Weston or the company.

Q. (By Trial Examiner Bennett): That was a Saturday, July 26?

A. I believe that date is right, a Saturday. I can tell you in just a second.

Q. (By Mr. Weil): While that was going on, did you at any time contact the National Labor Relations Board? A. Yes.

Q. When?

(Testimony of F. T. Baldwin.)

A. Well, I filed a petition with them for the election, I haven't got a copy of the petition, I can't tell you the date, I have it in the files there. If you will hand me my papers there, I can tell you.

Q. Here, does this serve to refresh your recollection?

A. Yes, on July 21. We also filed charges against them on July 21.

Q. You filed charges at the same time you filed the petition?

A. Well, it was one day after, we sent the charges in after we had heard rumors that they were going to discharge employees and [32] so forth.

Q. What action was taken on your petition, if you know?

A. The Examiner came in and was investigating the thing.

Q. The petition? A. Yes. The charges.

Q. Was any action taken on the petition?

A. No. We withdrew the petition.

Q. Why?

A. Well, we withdrew the petition because, of course, they wouldn't hold the election while an unfair labor practice was pending against the company.

Q. Have you refiled that petition or has the petition been refiled? A. The charge?

Q. The petition.

A. For election, no, it hasn't, it has been withdrawn. It was withdrawn on August 1st.

(Testimony of F. T. Baldwin.)

Q. Did Mr. Weston tell you why the company decided to consent to the election when you called him on the 24th?

A. I don't believe he said why, no. He just said they would consent to it.

* * * * * [33]

Cross Examination

Q. (By Mr. Weston): When you wrote the letter on July 18, which is General Counsel's Exhibit 3, when you wrote that, you knew there was to be an election, didn't you?

A. Well, I wasn't too sure, because the, I was under the impression that the election was going to be held the 18th, and it was postponed.

Q. Let's get this record straight on these elections. When you first asked for an election, you wanted the election to be conducted by our State Labor Commissioner, didn't you?

A. That is right.

Q. And I at that time told you there was some question as to whether the company was or was not engaged in interstate commerce, didn't I?

A. I think that is right.

Q. After that matter, then, I also informed you that I had so informed the labor commissioner of the State of Idaho?

A. I don't recall you saying that. I know that you did talk about, there was some question about whether it was under intrastate or interstate.

* * * * * [34]

Q. You were agreeable to that, weren't you?

(Testimony of F. T. Baldwin.)

That was satisfactory to you? A. Yes.

Q. To have the election conducted by our State Labor Commissioner? A. On the 26th?

* * * * * [36]

Q. (By Mr. Weston): Did you withdraw or ask the labor board to withdraw, the charges that had been filed against the company prior to the time of the election?

A. No. We only asked, you see, we filed with the——

Trial Examiner Bennett: Just answer the question.

The Witness: What was the question again?

Q. (By Mr. Weston): Did you ask to withdraw the charges that had been filed against the company just prior to the election? A. No.

Q. I believe you testified that the reason why the National Labor Relations Board didn't conduct the election was because there were charges filed?

A. I presume that is the reason. I don't know, it is my understanding they won't hold any election during the processing of charges.

* * * * * [38]

Q. You were perfectly agreeable to have that election and were perfectly agreeable that that election should be conclusive, as to whether you had the bargaining rights?

A. With the State Labor Commissioner, yes.

Q. As far as you were concerned, that would be decisive at that time? A. Yes.

Q. (By Trial Examiner Bennett): Do we have

(Testimony of F. T. Baldwin.)

the results of that election? A. We lost.

Q. (By Mr. Weston): Do you know the results of that election?

A. There was 23 no's and 17 yes's, I believe.

* * * * * [39]

Q. At the meeting in July, where Mr. Mills was present, did you or Mr. Mills or anyone else at that meeting tell these employees that they could get in at that time for $5 and later on it would cost $25?

A. I probably told them that myself because that is our rule under the international constitution and by-laws.

* * * * * [40]

Q. (By Mr. Weston): You also filed a petition with the National Labor Relations Board for an election, didn't you? A. Yes.

Q. The charges that were filed and the petition that was filed, they were filed prior to July 26, the time of the election?

A. I think that is right, yes. I might——

Q. (Interrupting): Just a minute.

A. Excuse me.

Q. You now have a charge filed which is incorporated in this complaint, requesting that the company bargain with the union without an election. Do you understand that? A. Yes.

Q. My question is, why did you permit the election to be conducted on July 26, did you expect us to bargain without an election?

* * * * * [44]

(Testimony of F. T. Baldwin.)

Mr. Weston: No, but I don't think that the Board would in the final analysis override the desire of the bargaining agent. In other words, are they going to order someone to bargain if he doesn't want to bargain? I think the paramount question here is what the representative of the union wants.

Trial Examiner Bennett: If you want to ask a direct question of that nature, I will permit it.

Mr. Weston: I have already asked this witness and he has already answered that he was willing to have the election and he was agreeable to it, to be bound by it.

Trial Examiner Bennett: I think he has so testified.

Mr. Weston: That is all. That is all I have, then, on that question.

* * * * * [46]

GORDON MILLS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): What is your name and address, please? A. Gordon Mills, M-i-l-l-s.

Q. Address? [49]

A. 516 Fourteenth Avenue North, Nampa.

Q. What is your occupation?

A. Maintenance worker.

Q. Have you ever been employed by the Home Dairies Company? A. Yes.

(Testimony of Gordon Mills.)

Q. During what period were you employed there?

A. Well, if my memory serves me correctly, it was November 8 to——

Q. (Interrupting): What year?

A. 1951—to August 4, 1952.

Q. What did you do there?

A. In the maintenance department.

Q. Who was your immediate supervisor?

A. Well, I guess Lynn Van Houten, oh, he was, when Jim Muller wasn't there, he took over, but Jim Muller was supposed to be my boss.

Q. He was your boss?

A. Yes.

Q. (By Trial Examiner Bennett): Did you say you were at Nampa or Caldwell?

A. Nampa.

Q. (By Mr. Weil): Did you know anything about the union's, how the union started organizing at Home Dairies? A. A little.

Q. Were you familiar with those circumstances? Perhaps you will [50] tell us.

A. A lot of it was just from hearsay, I mean, because I was on my vacation.

Q. Tell us what you know directly.

A. Well, this Sherman Call, I believe was his name, and Gene Hollenbeck, had gone and contacted the union representatives or they had contacted them. Now, I don't know if they went over or——

Trial Examiner Bennett (interrupting): I think

(Testimony of Gordon Mills.)

we might confine this to what he personally first learned.

Q. (By Mr. Weil): When did you first come in contact with anyone that was connected with the union?

A. Well, it was after returning from my vacation, June 19, I think, it was after that, between then and July 1st.

Q. After June 19 and before July 1. Did you sign an authorization card, an authorization application blank? A. Yes.

Q. When did you sign that?

A. I would say that was July 1, I am pretty sure, at a meeting.

Q. At a meeting on July 1? A. Yes.

Q. Did you see anyone else sign a card at that time?

A. Yes. One that I know of was Lynn Van Houten and——

Q. (Interrupting): How do you know?

A. We were sitting together, both in the maintenance department. [51]

Q. I see.

A. And we both used the same pencil, and we borrowed a pencil from Wuelfken. So that is why I remembered that.

Q. Mr. Wuelfken was heading up that meeting, I take it? A. Yes.

Q. Did you have any conversations with any officials of the company in which the union was discussed? A. Yes.

(Testimony of Gordon Mills.)

Q. When did you first discuss the union with any official of the company?

A. Well, the evening of, I guess it was July 1.

Q. With whom did you talk to then?

A. Jim Muller.

Q. That is the gentleman you referred to as your supervisor, is that correct?

A. That is right.

Q. Was there anyone else present?

A. There was four or five guys around there. It was around quitting time.

Q. Where was this discussion held?

A. It was in the garage where they repaired the trucks.

Q. Did the other persons there take any part in the conversation?

A. Not to my knowledge.

Q. Were they listening in on the conversation, if you know? [52] A. I think so.

Q. I mean, were they in a position to listen in on the conversation?

A. I think so, I guess they were, yes.

Q. The only persons that spoke, then, were you and Mr. Muller, is that correct, to the best of your recollection? A. Yes, that is right.

Q. Do you remember what was said in this conversation?

A. Well, Jim asked me if I would come down, it was something on the new building, and see about it. I believe that is what it was. Anyway, I said I hadn't planned on coming back and he

(Testimony of Gordon Mills.)

wanted to know why, and I said I was going to the union meeting, and he wanted to know if I would tell him, he said he had asked around what this was all about, and what the trouble was, and I said maybe the rest of them was afraid to talk up, but I wasn't, I didn't see any reason for fear, and he wanted to know what they were, and I said, well, the two main issues were a raise in hourly pay, what we would figure to hourly pay, and time and a half for overtime, and I told him that I intended to go.

Q. Was there anything further, if you can remember, about this discussion?

A. Oh, yes, we talked on quite awhile.

Q. Was Mr. Van Houten around at that time?

A. I don't really remember if he was there or not. There was four or five fellows around there.

Q. What was the condition of the work there? Was there a lot of work to be done at that time? Were you kept pretty busy or were you——

A. (Interrupting): Yes, I never lacked for anything to do.

Q. Was there any backlog of work to be done?

A. I was told so by Jim Muller.

Q. When were you told so?

A. Oh, it was right after I got back from my vacation. I know Lynn hadn't gone on his vacation yet.

Q. It was sometime after the 19th, then?

A. Yes.

Q. Was that within a day or so after the 19th?

(Testimony of Gordon Mills.)

A. Well, it was close to that. I don't know just when. I wouldn't say right to the exact date.

Q. Did you have another discussion with Mr. Muller when Mr. Van Houten was with you, that you recall, after this conversation?

A. The next day, a very heated argument.

Q. What happened?

A. Or a discussion, if you want to call it that.

Q. Was there anyone else present at that time?

A. Lynn Van Houten was there. There were others in the distance, but I don't know who they were.

Q. Where was this?

A. That was in the maintenance shop.

Q. What was the occasion of the argument? [54]

A. Well, I knew that from the way Jim was hanging around that day that he had something——

Trial Examiner Bennett (interrupting): Just tell us what took place, what he said and what you said, and how it came about.

The Witness: Well, he just came out and asked me did I go to the union meeting.

Q. (By Mr. Weil): What did you answer?

A. I told him yes.

Q. Did he say anything further?

A. One thing that he said, that I remember very clearly, was that "we really don't need only one maintenance man here".

Q. At that time how many did you have?

A. Two, in the direct maintenance. They classed the two mechanics as maintenance, too, I guess.

(Testimony of Gordon Mills.)

Q. Do you remember anything else that was said?

Q. (By Trial Examiner Bennett): Perhaps if you could give us the conversation in the sequence that it took place, it would be helpful.

Q. Do you want it word for word?

Q. If you recall it that way.

A. Well, that would come pretty close to what I had to say.

Q. Starting with the beginning, if you can.

A. "Jim," I says, "you are trying to tag this whole union deal on me," and I said, "by God you can make me awful mad but you are not going to scare me a damned bit." I said, "If I lose my job [55] over this I am going to see what can be done about discrimination because I wasn't the instigator of it." I said, "I merely went up there as an individual and," I said, "now you are trying to pin something on me that I am not to blame for at all."

Q. What had he said before that?

A. That he didn't need another maintenance man and he had just told me a few days before that, he just told me a few days before that he didn't know how in the hell we was going to catch up with the work we had to do.

Q. Continue with your answer.

A. Well, I can't remember it all, but I know I was pretty damned mad.

Q. (By Mr. Weil): Do you remember anymore? A. Oh, not of interest, I guess.

(Testimony of Gordon Mills.)

Q. Whether it is of interest or not.

Trial Examiner Bennett: Give us the rest of the conversation.

A. I expect that would cover it good enough.

Q. (By Mr. Weil): Do you remember Mr. Muller saying anything about laying off any men?

A. Yes.

Q. What did he say?

A. He said checkers, he said, he mentioned one specifically, Abbie Roe.

Q. How did he happened to mention checkers and Abbie Roe? [56]

A. I don't know what his motive was for that.

Q. What was the conversation that it led up to?

A. He said that if we have a union, we just can't afford it, and we are just going to have to lay off some employees.

Q. (By Trial Examiner Bennett): How did he refer to Abbie Roe?

A. He just mentioned that.

Q. What did he say?

A. They would have to lay Abbie Roe off. That is all that was said. I don't know why he picked on an old man.

Q. (By Mr. Weil): Was there a committee formed in the plant of employees about this time, to your knowledge? A. Yes.

Q. Were you a member of that committee?

A. Yes.

Q. Do you know how this committee came to be formed, how it happened?

(Testimony of Gordon Mills.)

A. Requested by Jim Muller that a representative from each department meet with the management.

Q. Whom did he request, I mean, how did it come to your attention that he requested it?

A. Well, they just came around, everybody, I guess, they just came around to everybody, I guess.

Q. (By Trial Examiner Bennett): Just say what happened to you.

A. Well, he just called a group of us there in the maintenance and said that they would like to have a representation from each [57] department.

Q. When did this take place?

A. Oh, the date I wouldn't know.

Q. You told us just now about the conversation you had the day after the July 1st meeting.

A. Well, it was a few days after that, but I wouldn't want to be specific, it was a few days after that, I wouldn't want to say just exactly.

Q. (By Mr. Weil): Was this Mr. Muller that called the fellows together in your section?

A. He requested it.

Q. How did you come to be a member yourself? How were you designated?

A. I nominated Lynn Van Houten and then a few hours after that Lynn came around and said that he would rather I would be the representative, and I don't know that other fellow's name, that other mechanic—Harold—I can't think of his last name—he said, "Why don't both of you go?",

(Testimony of Gordon Mills.)

and I said, "All right, I would just as soon both of us would go."

Q. (By Trial Examiner Bennett): Is that what happened? A. Yes.

Q. (By Mr. Weil): Do you recall the other members of the committee, who they were?

A. Oh, yes.

Q. Who were they? [58]

A. Let's see. It was——

Trial Examiner Bennett (interrupting): Either you do remember the names or you don't.

The Witness: If you would get the seniority list, I could show you the names, that I remember.

Trial Examiner Bennett: It is up to you, Mr. Weil. If you want to refresh his recollection, you may, or not, as you see fit.

Mr. Weil: Let me ask some questions directly.

Q. (By Mr. Weil): Was Paul Roe a member of this committee? A. Yes.

Q. Was Isaac Helton? A. Yes.

Q. Was Clyde Clevenger a member?

A. Yes.

Q. Was George Schamber a member?

A. Yes.

Q. Were there any other members besides yourself and those I named?

A. I don't remember if Gene Hollenbeck was or not.

Mr. Weil: That is all on that.

Q. (By Mr. Weil): Did this committee ever meet with any members of management?

(Testimony of Gordon Mills.)

A. Yes.

Q. When? [59]

A. That date I don't remember either.

Q. Was it before the election, that it was held there? A. Yes.

Q. Was it long before?

A. It was the date that the notice of the election was posted, because Jim Muller came back to the meeting and said there was a notice on the bulletin board. I believe it was Jim Muller that said that.

Q. Was that the date that the notice of the first election was posted or the second election?

A. The only election we ever had.

Q. The notice of the election that was held?

A. Yes.

Q. Because there has been testimony that there was a notice posted prior to that time, but that election was not held——

A. (Interrupting): Wait a minute, now, wait a minute. That I won't say. I know that there was an election notice posted and it was brought into the meeting at the time the committee met with management. I do know that.

Q. (By Trial Examiner Bennett): You made some reference to Mr. Muller in connection with that notice.

A. I believe it was he who came back into the meeting. He left the meeting and came back and said that there was a notice on the board, if I remember correctly.

(Testimony of Gordon Mills.)

Q. (By Mr. Weil): What time of the day was this meeting held? [60]

A. It was in the afternoon. We met in the unloading room, where they unload the cans, all sitting on boxes.

Q. Who besides the committee was present?

A. Ralph and Buck——

Q. (Interrupting): Would you give us their last names?

A. Ralph Little, Buck Lawrence, Jim Muller and the attorney here.

Q. (By Trial Examiner Bennett): Mr. Weston?

A. Mr. Weston, at the opening of the meeting.

Q. How did the meeting come about, if you know?

A. As I said before, it was requested by Mr. Muller.

Q. Mr. Muller asked you to come to the meeting?

A. Asked us to arrange a meeting, to get our representatives together and then meet with them.

Q. You told us about that before?

A. Yes, that is right.

Q. (By Mr. Weil): Was this meeting with management representatives held immediately after you were selected as a representative of the committee? Was this meting held with management held immediately after you were selected by your fellow employees to represent them?

A. No. If I remember correctly, there was a postponement of that meeting. We were to meet

(Testimony of Gordon Mills.)

one day and then it was postponed to the next day, if I remember correctly.

Q. So that meeting would have been a couple of days after that [61] selection, after the committee was formed? A. Yes, well, yes.

Q. (By Trial Examiner Bennett): Let's see if we can pin this down a little bit. You told us how Mr. Muller asked you to appoint a representative from your department. Now, with relation to that day that he made the request, when was the selection made?

A. We made the selection that day.

Q. With relation to the day the selection was made, when did you have this meeting with Mr. Muller?

A. I would say it was two or three days after that.

Trial Examiner Bennett: Next question.

Q. (By Mr. Weil): Do you recall what was said at this meeting? Do you recall what took place at this meeting? Would you give us a play-by-play description of it, who said what?

A. Well, it was brought out, we had a committee meeting, after the committee was formed, we met in the dining room and it was brought out there that if legal counsel was representing the company, or if he was present, that we didn't wish to discuss anything with him.

Q. Why was that?

A. I beg your pardon?

Q. Why was that?

(Testimony of Gordon Mills.)

A. Well, we didn't have legal counsel.

Q. All right. What happened at the meeting?

A. Well, I was appointed chairman of this committee, and I relayed to management and to Mr. Weston the feelings of the committee, which I thought was my duty, and asked that——

Q. (Interrupting): What were the feelings of the committee?

A. That Mr. Weston excuse himself from the meeting, after all we were just meeting with management.

Q. Did he do so?

A. Yes, after a little discussion.

Q. Who presided at the meeting with management, or was it that formal a meeting?

A. Well, it was. I guess I was the in-between more or less.

Q. (By Trial Examiner Bennett): You mean you spoke for your group? A. Well, yes.

Q. Did someone speak for their——

A. (Interrupting): Well, no, the men were to speak for themselves.

Q. Who spoke for management, if anyone?

A. All, Mr. Lawrence, Mr. Little, and Mr. Muller.

Q. They all spoke?

A. Yes. It was, what would you say, a round table discussion, just informal.

Q. (By Mr. Weil): In the course of this meeting, what sort of topics did you discuss?

Trial Examiner Bennett: Perhaps if we could

(Testimony of Gordon Mills.)

have the [63] witness tell us the sequence of the meeting as it took place, before we get into another type of questioning, it would be more instructive.

A. Well, I just don't remember word for word how everything came out, but——

Q. (By Trial Examiner Bennett—interrupting): After Mr. Weston left, what took place then?

A. I know we let management lead off. They wanted to tell us their hardships, that they couldn't afford more money.

Q. Who did this talking?

A. Well, I think they all three had a little say-so about that.

Q. Continue.

A. And I believe it was Ralph Little that brought up that they weren't, that it was unlawful to bargain while the union was in the process of organizing the plant, anyway, it was the employees who were in the process of organizing and——

Q. (Interrupting): What is your best reccollection, whether he used "union" or "employees"?

A. Well, the union, if I remember correctly, that is the way the law read.

Q. (By Mr. Weil): What else?

A. It was brought out by Little himself, well, first one would say that they couldn't give an increase and I thought Jim and Ralph was going to get in an argument before it was over as to whether they could or couldn't give an increase. [64]

Q. (By Trial Examiner Bennett): Ralph who?

A. Ralph Little.

(Testimony of Gordon Mills.)

Q. (By Mr. Weil): Jim Muller and Ralph Little?

A. Yes. And Ralph says, "We can't do anything now but after this is washed aside we can make some adjustments."

Q. Was there anything further that you remember?

A. No. That was pretty near the end of the meeting. Everybody left with a more or less friendly attitude.

Q. Was there any, were there any representatives of the union at this meeting?

A. No. You mean international representatives or business agents?

Q. Yes. A. No.

Q. Do you know whether any were invited?

A. No, they definitely were not, and that is why we didn't want any legal staff on the part of the company there.

Q. Was any mention made at the meeting of any changes in other working conditions than wages?

A. State that again, will you, please?

Q. Was any mention made in the meeting of any changes of other working conditions than wages, for instance, hours of work or conditions of employment other than wages?

A. No. They didn't want to discuss too much. I think—now, this is my own personal opinion——

Trial Examiner Bennett (interrupting): We don't want to get into that.

Q. (By Mr. Weil): Tell us what was said, not

(Testimony of Gordon Mills.)

a matter of opinion. Did they say anything to back up your personal opinion?

A. Well, then, I can't say anymore, if I can't bring out my own personal opinion, of what the meeting was called for. That is what I wanted to bring out.

Q. Was any discussion had of the length of the work day? A. Not to my knowledge.

Q. Was there an election held after this in the plant? A. Yes.

Q. Who conducted this election, if you remember?

A. You mean, who was the man who——

Q. (Interrupting): Who was the man who ran the election?

A. He was a State man. I can't recall his name. I was introduced to him, too.

Q. When was this election held, do you remember?

A. By that, you mean the hour, or——

Q. (Interrupting): No. What date?

A. Well, I can't tell you the date.

Q. Can you tell me approximately?

A. No.

Q. Did you attend the meeting on the 24th of July, of which Mr., I think—I don't know which one of the union agents mentioned it—— [66]

Mr. Baldwin (interrupting): The 24th?

Q. (By Mr. Weil—continuing): The 24th, at which there was some discussion about walking out if there was no election?

(Testimony of Gordon Mills.)

A. Attending a union meeting at which there was a discussion about walking out?

Q. Yes. A. Yes.

Q. The record will show, I think, that that meeting was on the 24th. Was the election held after that? A. After that meeting?

Q. Yes. A. Yes.

Q. Was it long after that meeting?

A. Not very long, if I remember correctly.

Q. A couple of days?

A. I would say around that time. It was pretty close there.

Q. So the election would have been held around the 26th, is that right. That was a Saturday, I believe. Yes.

Trial Examiner Bennett: While I think about it, may we have the exact title of the State agent for the record, the State official who is involved?

Mr. Weston: Commissioner of Labor.

Trial Examiner Bennett: Commissioner of Labor?

Mr. Baldwin: For the State of Idaho.

Q. (By Mr. Weil): Where was this election held? [67]

A. It was in the little wholesale room, I don't know as the room has ever been named, but——

Q. (Interrupting): Was it a room in the plant?

A. Yes, a small room.

Q. Were you present at the voting?

A. I was an observer.

Q. You were an observor for the union?

(Testimony of Gordon Mills.)

A. Yes.

Q. Who was the company observer?

A. Ralph Little.

Q. Were any other members of management other than Mr. Little present during the voting?

A. In the room?

Q. Yes.

A. Not during the voting, no, there was no one there but Ralph Little and I and this State Labor man and whoever was doing the voting.

Trial Examiner Bennett: Does the record supply Mr. Little's title?

Mr. Weston: Secretary-treasurer.

Trial Examiner Bennett: Of the corporation?

Mr. Weil: Yes.

Q. (By Mr. Weil): Do you know where Mr. Muller was during the voting?

A. There was two large windows there and he was right by those, [68] I would say, oh, ten, fifteen feet.

Q. (By Trial Examiner Bennett): Ten or fifteen feet from what? A. From the windows.

Q. Where was he with relation to where the polling was?

A. The polling was on the other side of the window. He was on the outside and we were on the inside.

Q. You mean outside the room completely?

A. Yes.

Q. On the outside of the building?

A. Well, there is a porch out there. I don't

(Testimony of Gordon Mills.)

know if he was under a roof, I don't know if that is a, considered a building or not, technically.

Q. (By Mr. Weil): Was there a door there beside the two windows?

A. No. It is at the end of the building.

Q. Was he near the door?

A. Yes, he was 20 or 25 feet from the door.

Q. Was he in a position past which the voters had to come to vote?

A. Well, they were all out, congregated out there.

Q. They were congregated out—around him, or I mean, in that section of the floor?

A. Well, they were all——

Q. (Interrupting): Was anyone else with Mr. Muller?

A. Well, all of them, Buck Lawrence and Jim Muller and all the employees were all out there during the election. [69]

Q. Was that usually the case at that time of day, everybody was out there in that space?

A. Oh, no.

Q. (By Trial Examiner Bennett): By "Buck Lawrence", do you mean Carroll Lawrence, the manager?

A. I never did hear his name. That is all I know.

Q. Was that the manager or an employee?

A. He is the co-owner, I have been told.

Q. (By Mr. Weil): Were Mr. Muller or Mr.

(Testimony of Gordon Mills.)

Lawrence engaging the men in conversation during the time they waited to vote?

A. Everybody was talking. What they were saying, I didn't know.

Q. You were inside the windows, were you?

A. Yes.

* * * * * [70]

Cross Examination

Q. (By Mr. Weston): Isn't it a fact, Mr. Mills, they also told you to go ahead and listen to what the company had to say, but it wouldn't make any difference anyway, or words to that effect?

A. No, I wouldn't say so.

Q. Isn't it a fact that Mr. Baldwin or somebody representing the union said, "Well, go ahead and have your meeting, listen to what they have to say and speak your piece, but it doesn't mean anything"?

A. He said go ahead.

Q. He said go ahead and have the meeting, Mr. Baldwin said that, did he?

A. Baldwin was informed that there was to be a meeting, but as to what he said, I don't remember of him expressing much, only he said go ahead and have the meeting, but the last I don't remember of him saying about it to me.

Q. You are quite sure that he didn't tell you to put the attorney out if he wasn't represented?

A. No. That was brought up in the meeting and I don't even know who brought that up.

Q. That was your own idea?

(Testimony of Gordon Mills.)

A. That was brought up in the meeting that they bet the company attorney would be there.

Q. You decided that you didn't want the company attorney there [74] if you didn't have yours there?

A. That was the body's ruling. The union didn't have anything to do with that.

Q. It was your feeling if the company was to be represented by counsel, then, the union should be represented by counsel?

A. That is right. We explained that to you that day.

Mr. Weil: I think there was a misstatement there in the question. I don't believe that he stated it was his understanding that if the company was to have their attorney that the union should have an attorney. He said that the union didn't know anything about this discussion. I think perhaps he meant that the committee should have an attorney.

Mr. Weston: I object to your trying to interpret the testimony.

Trial Examiner Bennett: You can re-examine him if you wish to on redirect.

Q. (By Mr. Weston): I believe you testified on direct examination, Mr. Mills, that among other things at that meeting Mr. Little said that it was unlawful to bargain with your committee while the company was being organized by the union, or words to that effect, is that right? A. Yes.

* * * * * [75]

(Testimony of Gordon Mills.)

Q. You wanted time and a half for overtime?

A. Yes.

Q. Is that when he explained to you that if you had a union contract with time and a half, that it would cost the company too much money?

A. Well, he brought that out at that time, I believe.

Mr. Weston: I believe that is all.

* * * * * [77]

CLYDE CLEVENGER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [82]

Direct Examination

Q. (By Mr. Weil): Would you give us your name and address, please?

A. Clyde Clevenger, 1023 Fern, Nampa, Idaho.

Q. What is your occupation?

A. Deliveryman.

Q. Are you employed at the Home Dairies Company? A. Yes.

Q. How long have you been employed there?

A. Since the first day of March 1950.

Q. Have you signed a card authorizing the Teamsters Local 483 to bargain on your behalf?

A. Yes.

Q. When did you sign the card?

Trial Examiner Bennett: Which card was that, 2-what?

(Testimony of Clyde Clevenger.)

Mr. Weil: That is 2-A.

A. It was on or about the 18th, I believe, of July.

Q. (By Mr. Weil): The 18th of July?

A. Wait a minute. It might have been June. It was the first meeting that we had down there.

Q. The first meeting?

A. The first meeting.

Q. How did you hear about this meeting? How did you happen to attend this meeting?

A. There were a couple of boys that had went over and contacted the union in some respect and the union man said that he would [83] let it be known when the first meeting would be held and I was told about a day or two before the meeting what night it would be on.

Q. Do you remember who told you?

A. No, sir, I don't.

Q. Did you attend—that was the meeting of June 18th that you attended, then, the first union meeting held?

A. Yes, yes.

Q. Do you remember who was present at that meeting?

A. Well, yes, approximately, I believe I know who was present at that meeting.

Q. Could you tell us as many as you recall?

A. I think there was Gene Hollenbeck, Gordon Mills, Lynn Van Houten, Clay Buckles, and I believe this Norman Stathopulos, or whatever his name was, was there. And that is about all that I recall being there.

(Testimony of Clyde Clevenger.)

Trial Examiner Bennett: You say Norman Stathopulos?

The Witness: Yes, I believe he was there.

Q. (By Mr. Weil): Was he familiar to you, was Mr. Stathopulos familiar to you?

A. Yes, very familiar.

Q. How did it happen that you were familiar with him?

Q. You mean that I was acquainted with him?

Q. Yes.

A. Well, we had done lots of talking and, I don't know, we [84] had chummed around a little, more or less, at the dairy there and he had been out at my place once or twice at night.

Q. Where was he working at that time?

A. He was on the route for the so-called Woodlawn Dairy.

Q. Where did he get his milk?

A. At Home Dairies' plant.

Q. And you met him when he came in there?

A. Yes.

Trial Examiner Bennett: What did he do, now?

The Witness: He drove a truck for the Woodlawn Dairy that was working out of the Home Dairies plant.

Q. (By Mr. Weil): Was milk for the Woodlawn Dairy produced at the Woodlawn Company?

A. No, sir. It was produced at the Home Dairies plant, processed there.

Q. Did you have any conversation with Mr. Muller after that meeting?

(Testimony of Clyde Clevenger.)

A. Yes. I had one conversation with him.

Q. When was that?

A. I can't just exactly recall the date, but it was, I believe it was, the day before our second meeting that we had.

Q. Was that the meeting that testimony has indicated was on July 1?

A. I would say yes.

Q. So that it would be probably the day before July 1? [86]

A. I believe it was on the day of the meeting that was held that night.

Q. On July 1? A. Yes.

Q. Who was present when you spoke, talked to Mr. Muller? A. No one.

Q. Just yourself and he?

A. Just he and myself.

Q. What time of the day was that?

A. I would say that was around 11 o'clock in the day, when I was just getting ready to go home.

Q. I see. And where did you talk with him?

A. It was at the door, the entrance to the dining and dressing room.

Q. Is that the small building behind the main plant?

A. It adjoins the garage and the shop out there. They are all under one building out here.

Q. Suppose you tell us what was said and by whom during this conversation.

A. Well, as I recall, Mr. Muller asked me how our meetings were going and I said, "Very well,

(Testimony of Clyde Clevenger.)

I guess, as far as I know." He said he would like to——

Q. (Interrupting): By "meetings," do you know what he was referring to?

A. The union meetings. [87]

Q. How do you know he was referring to the union meetings?

A. Without a doubt. They were the only meetings we were having.

Trial Examiner Bennett: Did he use the word "our" or did he use another word?

The Witness: "How is your meetings going?"

Q. (By Mr. Weil): And then you told him what?

A. I told him "Very well," I thought. And then he said, "I would like to find out what the trouble is, why the boys are trying to bring something in like this. I think I have been agreeable to anything they ever have suggested to me", and I said, "Well, Jim, it's because of the overtime they are working and not getting any extra money for it." Basing that on an eight-hour day was what I was referring to. And then there was a time that some of the employees had to go on night shifts there and they received a raise out of it. Us drivers were on nights at the time, too, and we never got a raise at any time of the year when we went on nights. I said, "I think some of the boys are wound up over that pretty tight," and I said, "The holidays, we don't get any extra pay for that. And other than that," I said, "I think the boys are fairly

(Testimony of Clyde Clevenger.)

well satisfied, but they can't see they are going to have any way of getting any extra money for putting in over eight hours a day."

Q. Do you recall anything else about this conversation?

A. Yes. He says, "After all, I would like to get to the bottom of this. If you could find out why these boys keep on [88] insisting they have the union in I would like to know about it and see if I can iron this out," but he never did contact me after that.

Q. Do you have any knowledge of an employee committee that was formed in the plant?

A. I knew that they were forming a committee, yes, I knew that.

Q. How did you find out about that?

A. The route foreman was the first one that told me that everyone that, that they were going to form a committee to meet with the stockholders.

Q. Who was the route foreman?

A. It was Leonard Cable at the time. And I was asked by one or two of the drivers if I would be on that committee and I said no, that I was going fishing that weekend and I didn't figure I would be back in time for the meeting, and I told them then that I didn't see there was going to be anything accomplished in the meeting and I didn't figure on ruining the fishing trip just for the meeting.

Q. Who was selected by that group of drivers in your place then?

(Testimony of Clyde Clevenger.)

A. I believe George Schamber and Gene Hollenbeck was the two drivers in our place then.

Q. Did you vote in the election?

A. Yes.

* * * * * [89]

Cross-Examination

Q. (By Mr. Weston): At the time you talked to Mr. Muller and mentioned the fact that the boys weren't interested in overtime, night shifts and holidays, he didn't make any threats to you at that time, did he? A. No, sir.

Q. Or promises? A. No, sir.

Q. What you reported here is practically all the conversation you had at that time, on that question? A. Yes.

Q. You have given us practically everything that was said, have you?

A. I believe that, everything that I can recall anyway. * * * * * [91]

GENE HOLLENBECK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): Would you give your name, please, and spell [93] it?

A. Gene Hollenbeck.

Q. And your address?

A. 1411 Eleventh Avenue South, Nampa, Idaho.

(Testimony of Gene Hollenbeck.)

Q. What is your occupation? A. Driver.

Q. Are you employed by the Home Dairies?

A. Yes, I am.

Q. What do you do there, drive?

A. Yes, I drive a truck.

Q. I guess that follows.

Did you join the union while you were employed there? A. Join it?

Q. Yes.

A. No. I signed an application.

Q. You signed an application blank?

A. Yes.

Q. When did you sign an application blank?

A. I signed it the first meeting, at the first meeting.

Q. That would be the meeting of June 19, is that right, approximately? A. Yes.

Q. When did you first know about the union being interested in organizing the employees?

A. The day that Sherman Call and myself went over to Boise to [94] the Wage and Hour Office. That was to talk to Shaw, I don't know his first name. And he told us that there was nothing that the Wage and Hour could do on this fluid milk deal because it was through the second process and going interstate, and he said that, he said something, I forget just how he worded it, that the thing for us to do was to get ahold of this, he gave a name but I couldn't think of it, he was a union man that was supposed to be with the Teamsters, and he would give him a ring, and I told him that

(Testimony of Gene Hollenbeck.)

I didn't want any part of it right then, I told this Sherman Call, well, he was supposed to have given the union man Sherman's number to get ahold of, to call him at his home.

Q. Then, after that occurrence, did you know that Mr. Baldwin or Mr. Wuelfken had contacted Mr. Call?

A. Well, I knew one of them did at the time that Shaw called the union man, he wasn't home, or he was out of town, and he left a note or he was supposed to have left a message to call Sherman Call.

Q. When did you hear about this meeting to be held on the 18th?

A. Sherman Call told me.

Q. Sherman Call told you that? A. Yes.

Q. And then he resigned before the meeting was held? A. Yes.

Q. Did you attend any other meetings of the union than the [95] first one?

A. Yes. I attended, I believe it was the second meeting, and then I attended one more, but I don't remember which one it was.

Q. Did you ever discuss the union with any of the owners of the company or any of the members of management? A. Yes.

Q. With whom?

A. Well, Buck Lawrence, this Carroll Lawrence, and this Jim Muller, I believe, was the only ones that—indirectly—I didn't—I was led around to the union through our conversation.

(Testimony of Gene Hollenbeck.)

Q. Were these two conversations or one conversation with both?

A. Two conversations, a separate one with each.

Q. Let's take the first one you mentioned.

A. With Lawrence.

Q. Who else was present at that occasion? Do you remember?

A. There was just Lawrence and myself.

Q. Where did you talk?

A. Around where they unload the cans off their can trucks.

Trial Examiner Bennett: Could you endeavor to fix a time?

Mr. Weil: Yes, I am just about to try to.

The Witness: It would have been around 12 noon.

Q. (By Mr. Weil): About what date?

A. I think it was around after about that third meeting. I [96] wouldn't say for sure.

Q. Would that be the meeting of the 7th of July? A. I believe so.

Trial Examiner Bennett: You mean of 9th of July, I think.

Mr. Weil: The 9th, yes.

Q. (By Mr. Weil): Can you tell us what was said in this conversation?

A. Well, I think what started it off was the fact that I told Buck, there had been a lot of talk around there that I had been the one that had started the union, I didn't want them to think that I was the one, that I was the instigator of it, be-

(Testimony of Gene Hollenbeck.)

cause Sherman Call was, you see, he was the one that actually got the ball rolling, and there had been some understanding around there that I was the one that had done it, but all I had done was seen Shaw, see, I went over to talk to Shaw, was all, and I told Buck, I said, "I don't want you to get the idea, you guys to get the idea, that I am the instigator of this." We talked back and forth there about the men that, a couple of the men that they had working there that one, when one had come and asked for work he had told Buck, that was when Buck had his own plant, had his own business, that it would take him 12 hours to, or 13 hours to, do 8 hours' work, he admitted he was slow, and Buck said that if, he said he didn't see how, if they went union, that he could keep a man on and pay him time and a half for that extra work. [97]

Q. Did he name this man?

A. Frank Williamson, I believe, was his name.

Q. Did he name any others?

A. No, Buck never named any others that I know of.

Q. Did he say it would be just about impossible to keep having Abbie Roe as a bottle washer?

A. No, he never said it would be impossible to keep him. It seems, if I can remember, what he said was, it was about Abbie Roe's eyes, he was talking about giving these men a break, the argument was that the union would hang onto these men and he said they had been giving him a break

(Testimony of Gene Hollenbeck.)

by keeping Abbie Roe on, his eyes were bad, they would get a lot of chipped bottles and stuff like that, that would hurt business, he said that——

Trial Examiner Bennett: Let's have another question. And will you please both keep your voices up.

Q. (By Mr. Weil): Were you a member of the employee committee? A. Yes, I was.

Q. How did that committee come to be formed?

A. Well, I understand it was the stockholders that wanted the committee to come and talk to them, give them an idea what, try to find out what the trouble was, if there was any trouble. I guess it wasn't supposed to be connected with the union but it, I don't know for sure, I just——

Trial Examiner Bennett: I think we might confine this to what he personally was told. [98]

Q. (By Mr. Weil): How did you become a member of the committee?

A. Well, I was appointed.

Q. By whom?

A. I believe Cecil Thompson nominated me. I was representing the non-commissioned drivers of the Sherman Stump, and Cecil Thompson and myself and Schamber represented the commissioned drivers under the same foreman.

Q. You went to the first meeting? A. Yes.

Q. Do you remember when that meeting was held? A. No, I don't.

Q. Do you know how the meeting was called? Or do you know by whom it was called?

(Testimony of Gene Hollenbeck.)

A. All I know is that Sherman Call was the one that, it seems like——

Q. (By Trial Examiner Bennett): Who told you about the meeting?

A. Well, Sherman; I was thinking Clyde did. Now I am not sure, but I think he did. You see, Sherman had quit in the meantime.

Q. He quit before the meeting? A. Yes.

Q. (By Mr. Weil): He wasn't a member of this committee, was he? A. No, he wasn't.

Q. Do you remember anything that went on at this meeting? A. Well—— [99]

Trial Examiner Bennett (interrupting): Before we get into that, I would like to know if the witness knows anything more than he has already told us about how the meeting came about.

Q. (By Trial Examiner Bennett): Do you have any personal knowledge of it? Either you do or you don't. A. Just what I was told was all.

Q. You were told there would be a meeting?

A. That's what I say; I think it was Clyde, Clyde that told me.

Q. One of the men?

A. Yes, because I wasn't——

Q. (Interrupting): Now, tell us what took place at the meeting.

A. We went to the meeting and Gordon Mills asked the lawyer to leave, he asked for an introduction and told them that we didn't have our lawyer with us or anybody to talk for us, so, and the men had decided that he should leave and that

(Testimony of Gene Hollenbeck.)

we wasn't going to do any talking or anything until he did leave. And we never, all we did was submit our, what we thought we would like to have, on our contract that we drew up ourself to them, and they kept saying that they couldn't negotiate any at all, they couldn't promise one way or the other while this was going on, while, you know, the negotiating was going on there.

Q. (By Mr. Weil): You say you submitted a contract. Was that the list that I think Mr. Clevenger mentioned — not Mr. Clevenger — that Mr. Mills mentioned—the things that you had talked over [100] in the meeting of the committee itself?

A. Yes, rate of pay and holidays and time and a half, things of that sort.

Q. Do you remember anything else that was said at that meeting?

A. Well, they, one of the fellows there, I don't know who it was, kept trying to, was wanting to pin them down—the idea most of the fellows had when they went to the meeting, they was going with the idea that the dairy was going to tell us whether they were going to give us more money or not, and I think a lot of them there wanted to know whether, if the dairy was going to give them more money they wasn't going to go union; if they wasn't, why, they planned on voting for it.

Q. Do you remember a representative of the management saying anything about the company eliminating the Cascade route?

(Testimony of Gene Hollenbeck.)

A. Yes. I don't remember, I can't remember, who it was.

Q. You do remember, it was Mr. Lawrence and Mr. Little and Mr. Muller who represented management at that meeting, wasn't it? A. Yes.

Q. It was one of the three of them?

A. Yes, it was one of those three.

Q. Do you remember just what was said in that respect?

A. Well, they said that that route was taking around 12 to 13 or 14 hours, I guess it wasn't paying for itself then, and they could hardly keep it agoing if they had to pay time and a half [101] or anything over eight hours for it.

Q. Did you vote in the election? A. Yes.

Q. When you went into the election, did you understand that after the union was washed up that you would get a raise?

A. Yes, I was pretty sure, I thought we would get something.

Q. Did you get that raise?

A. I got five dollars.

Q. A day, week, month? A. A month.

Q. (By Trial Examiner Bennett): You say you had that understanding. Where did you acquire it?

A. When I had my conversation with Muller, Jim Muller.

Q. (By Mr. Weil): What did he say?

Trial Examiner Bennett: Could you fix the date first?

The Witness: I don't remember what day it was.

(Testimony of Gene Hollenbeck.)

Q. (By Mr. Weil): Was that the conversation we were discussing earlier? A. No, it wasn't.

Trial Examiner Bennett: I don't think he gave us that.

Q. (By Mr. Weil): Who was, who else was, present at that conversation?

A. Just Jim and myself.

Q. Where did that take place?

A. We was talking around the lunchroom, outside the door of [102] the lunchroom.

Q. Was that before the day of the first union meeting?

A. No.

Q. Was it before the committee meeting?

A. It was just a short while before the election that they had posted, the first election.

Q. Shortly before the 18th?

A. It seemed to me like it was around four or five days, I wouldn't say for sure, but it was somewhere around in there.

Q. Somewhere around the middle of July, is that right?

A. Yes.

Q. Can you tell us what was said then?

A. He asked me, he would like to know what the trouble was, what seemed to be the fellows' troubles, the reason why they wanted to go union, and I told him that I thought it was because of the overtime we was putting in, around anywhere from two to four hours, us three guys, a day, that was Cecil Thompson and Sherman Stump and myself.

(Testimony of Gene Hollenbeck.)

Q. And then what else?

A. Jim said that he thought they would try to work out something for the fellows, they had been planning on it, but they just had never done it yet, he said they would try to work out something for the fellows to make up the difference on that overtime.

Q. Now, at the committee meeting, do you recall Ralph Little [103] telling, stating, something to the effect that after the union was washed aside they could make some wage adjustments.

Mr. Weston: We are going to object to that form of questioning as leading and suggestive. I think he can tell what Mr. Little said. There is no evidence here that he said anything about being washed out.

Trial Examiner Bennett: If you will first exhaust the witness as to everything that took place at the meeting, I will then permit you to go into another type of inquiry.

Mr. Weil: I understood he had done so.

Trial Examiner Bennett: Maybe he has. I want to find out if he recalls anything else about the meeting.

Q. (By Mr. Weil): Do you recall anything else about that meeting, the meeting of the employee committee with the management?

A. Well, I wouldn't say for sure who it was, but somebody kept asking, kept asking, whether there would be something done. They wanted to know if they voted a union out, if they wouldn't

(Testimony of Gene Hollenbeck.)

get anything, or if they would have to vote it in to get something, and of course they kept arguing they couldn't say what they would give us or anything like that because they wasn't supposed to, but, as I recall, it seems to me that Ralph Little made some kind of a nod that they would naturally try to work out something.

Q. (By Trial Examiner Bennett): Some kind of a nod?

A. Yes, (demonstrating) like that.

Q. You mean nodding his head? [104]

A. Yes.

Q. What came just before the nod?

A. Just the way I saw him do it was, he said when, whoever it was that was asking the question, they asked him, "Will there be something done for us if we do vote this out? How will we know? Will there be anything done for us at all?" And Ralph said, "I am sure, I think that something will be worked out (demonstrating)," like that, nodded his head.

Trial Examiner Bennett: That is all. Just what took place.

Q. (By Mr. Weil): When you went to vote, did you see Mr. Muller and Mr. Lawrence standing outside the voting place?

A. I saw Jim. I never noticed too much. That is all.

Q. Did he address you at that time?

A. Not that I know of.

Mr. Weil: I think that is all.

(Testimony of Gene Hollenbeck.)

Cross Examination

Q. (By Mr. Weston): How are you paid, Gene?

A. By the month.

Q. Do you get a commission, too? A. No.

Q. Just straight by the month? A. Yes.

Q. Is your pay dependent upon the size of your route or the amount of your work?

A. Yes, I believe it is, yes, the amount of hours that I put in.

Q. So your pay increases with the increase in your route and [105] the amount of hours that you put in, is that right?

A. If my hours went up, why, I would get a pay increase.

Q. When did you get your last increase?

A. Well, when everybody got a flat five-dollar raise down there.

Q. Did your route increase along about that time also? A. No. It went down.

Q. Did your hours increase?

A. The hours went down.

Q. (By Trial Examiner Bennett): From the time you got the five-dollar raise, your hours and route decreased? A. Yes.

Q. (By Mr. Weston): That is when everybody got the flat increase? A. Yes.

Q. Now, coming back to this meeting where Mr. Muller and Mr. Lawrence and Mr. Little appeared with your committee, do I understand that you presented some requests to the company for in-

(Testimony of Gene Hollenbeck.)

creases, time and a half? A. At the meeting?

Q. Yes. A. Yes.

Q. And they told you at that time, Mr. Little told you, that he couldn't give any increases as long as the union was trying to organize the company, is that right? [106] A. That is right.

Q. Did he explain that it was against the law to do it? A. Yes.

Q. He said he couldn't do it? A. Yes.

Q. He couldn't accede to your demands because the union was trying to organize the company?

A. Yes.

Q. At that time it would be improper for him to do it, isn't that right?

A. Yes. He said it would be against the law.

Q. Didn't one of the members of that group representing management explain to you that as soon as the election was over and the question of union representation was decided they could give, then give, consideration to your increases? Isn't that what they explained to you?

A. I don't understand you.

Q. This expression of the union being washed out, who made up that expression? Or was that made up? A. I never heard that.

Q. You didn't hear anybody on management say that? A. No.

Q. Didn't Mr. Muller or Mr. Little or someone there explain to you that they couldn't make any increases to you while the union was trying to organize? [107] A. Oh, yes.

(Testimony of Gene Hollenbeck.)

Q. But after the thing was all settled, then they could give some consideration to your requests, isn't that right? A. Yes.

Q. That is your understanding of what their position was? A. Yes.

Q. And then after you had the election on the 26th and the union lost the election, you got a five-dollar increase, didn't you? A. Yes.

Q. And that was after the election?

A. Yes.

Q. (By Trial Examiner Bennett): How long after the election did you get that increase?

A. Well, let's see. The election came the 26th.

Q. Which was a Saturday.

A. All right. The raise went into effect the following month.

Q. The following Monday?

A. The following month.

Q. August 1?

A. The following month after the election we got the first raise, on the 15th check, of two and a half.

Q. You get paid twice a month?

A. That is right.

Q. And you got it in your check for August 15? [108] A. Yes.

Q. What period of time did that cover?

A. From the first to the fifteenth.

Q. You get paid on the 15th?

A. From the first to the fifteenth, I get paid on the seventeenth.

(Testimony of Gene Hollenbeck.)

Q. And that check reflected a raise?

A. Yes.

Q. When did your hours change and the size of your route?

A. Right around that time there. I don't know for sure what day it was.

Mr. Weston: Did you ask him if his route increased?

Trial Examiner Bennett: Decreased.

Q. (By Trial Examiner Bennett): I believe you testified before that your hours and route decreased. Is that right? A. Yes.

Q. (By Mr. Weston): Didn't your route increase along about that period between July 26 and August 1 and then drop off again.

A. What date was that?

Trial Examiner Bennett: July 26 was the election.

Q. (By Mr. Weston): Just prior to the time of the increase hadn't your route increased and then dropped back off again?

A. You mean by time, the hours I was putting in?

Q. No. By customers, by volume.

A. Gosh, I don't know. [109]

Q. Does your volume go up and down or your hours increase and decrease?

A. Well, no. It doesn't make much difference on my hours because I have got a lot of driving. I drive, I think, about a hundred and ten miles a day. It don't take any longer to fill up and stop than it

(Testimony of Gene Hollenbeck.)

does to just partly fill up, so the hours stay about the same. * * * * *

Q. Who was it that told you to go ahead, your committee, to go ahead and meet with management, but is wouldn't do any good anyway? A. Mills.

Q. Was that his idea or did he get that idea from someone else? Did he tell you that?

A. I don't know. [110]

Q. What did he tell you about that?

A. When we was having our meeting Mills said the chances are they will probably have a lawyer there and we should ask him to leave and he said we just might as well be ready to not accept their offer, no matter what their offer was.

Q. So when you went into that meeting you weren't going to do what the company suggested, you were going to go union anyway, were you not?

A. That was the idea.

Q. So the meeting was just to be a formal affair, to sit down and meet, to listen to the company's story and then go union?

A. Yes. They took a vote of the committee there on that.

Q. Before the meeting?

A. Yes; our little meeting.

Q. That is when they decided that, right?

A. That is right. We had a secretary and everything and they kept a record of it. I don't know where it is now. * * * * * [111]

Q. Were you told that if you signed an application blank for membership in the union it would

(Testimony of Gene Hollenbeck.)

cost you five dollars on that date and twenty-five dollars later on?

A. That is what Mills said at a meeting. I believe he was there that day when Mills said it, he was having a heated argument with Johnny Heinze about this. Johnny was arguing against the union and Gordon said, "If you join now you can get in for five dollars, pay your first month's dues, and if you are going to hold off it will cost you twenty-five bucks to get in later."

Q. Was that the same time that he said if you didn't join the union you would lose your job?

A. Well, if they had a closed shop, it was talked about if they had a closed shop, I mean if they had one and you didn't join [112] the union you would naturally lose your job.

* * * * * [113]

Q. Did you actually have a contract there that day when you met with the committee?

A. We drew up one.

Q. Did anybody help you draw it?

A. Well, there was Gordon Mills, he kind of acted as the president of the outfit, and I believe that George Schamber was the secretary, took the notes, and then the fellows in each department told their representative what they wanted and we wrote it down on the paper, that is, George wrote it down.

Q. You didn't have a union contract there to go by, did you? A. No.

Q. Mills didn't have a union contract there?

A. Not that I know of, no.

(Testimony of Gene Hollenbeck.)

Q. Now, coming back to your original desire to go into the union, you say that was suggested to you by Mr. Shaw of the Wage and Hour Division?

A. Yes.

Q. While you were there, and Call, did he pretend to call or try to call one of the union boys?

A. That is right.

Q. And then they were to call back?

A. That is right.

Q. So really Mr. Shaw is the one who tried to organize you, isn't that right?

A. That is right. [114]

Q. With reference to this Cascade route, did Mr. Muller explain that the reason they were going to take that off was because it wasn't paying?

A. That is right. * * * * *

Redirect Examination

Q. (By Mr. Weil): At the committee meeting on this matter of the Cascade route, did you hear the statement to the effect that the company would have to eliminate the Cascade route if the union came in? A. Yes, I heard that.

Q. Did you hear any statement that they would have to charge [115] for shortages if the union came in?

A. Yes. I heard lots of stories like that, though.

Q. I say, at the employee meeting, at the committee meeting.

A. No, I can't, I can't really recall whether there was anything said like that at that meeting

or not. There was several times that they referred to a union plant like Arden, the different things they went through, that they had to account for their shortages and things of that sort.

* * * * * [116]

RALPH LITTLE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): Will you give us your name and address.

A. Ralph Little, Route 1, Nampa, Idaho.

Q. What is your occupation?

A. Oh, dairyman and farmer.

Q. Are you connected with Home Dairies?

A. I am.

Q. In what capacity?

A. I am secretary treasurer and I am co-owner in the venture.

Q. The venture is a corporation, is it not?

A. Yes.

Q. Are you familiar with the Woodlawn Dairy?

A. Yes.

Q. Can you tell me who owns that?

A. Jim Muller and Buck, Carroll Lawrence, myself, and M. C. Muller and Chauncey Payne.

Q. Are those the same individuals who own Home Dairies? A. They are. [117]

Q. Does Home Dairies own any of the, does

(Testimony of Ralph Little.)

Home Dairies as a corporation own any of the, Woodlawn Dairy? A. No.

Q. What is the setup of Woodlawn Dairy? Is that a corporation? A. Partnership.

Q. Partnership. Are there any owners of Woodlawn who do not own shares in Home Dairies?

A. No.

Q. Are there any owners of Home Dairies who do not own shares in Woodlawn? A. No.

Q. Who manages the affairs of Woodlawn Dairy? A. Muller.

Q. That is, Jim Muller? A. Yes.

Q. Who keeps their books? A. I do.

Q. (By Trial Examiner Bennett): Where is the office of Woodlawn Dairy?

A. We have an office in the Canyon Building.

Q. In Caldwell? A. Nampa.

Q. (By Mr. Weil): What business is transacted in that office?

A. Receiving monies from customers.

Q. How many employees do you have in that office? [118]

A. That is set up on a commission setup. They receive so much for the money received and they take care of their, with their own personnel.

Q. Who is "they"?

A. Floyd Russell is the manager. He is the only one I know personally.

Q. (By Trial Examiner Bennett): He is not an employee of Woodlawn? A. No.

Q. (By Mr. Weil): Then, stop me if I am

(Testimony of Ralph Little.)

wrong, then, Woodlawn, the actual buying and selling of Woodlawn and the passage of money is transacted by this office, is that corect?

A. They receive the money and turn it over to me. I am custodian of the funds.

Q. Does Woodlawn own its own processing equipment? A. No.

Q. Who processes their products?

A. They have a processing agreement with the Home Dairies.

Q. What is the gist of that agreement?

A. Buy and sell.

Q. Home Dairies buys and sells milk for Woodlawn?

A. No. We buy the milk, process it and sell it to them at a stipulated price, f.o.b. the factory.

Q. (By Trial Examiner Bennett): How many employees does Woodlawn have? [119]

A. They only have one at the present time.

Q. How about in July? A. One.

Q. Who was that?

A. Norman Stathopulos.

Q. He was the driver?

A. That is right. Of course, I was an employee. I spent time there.

Q. How about the truck that Stathopulos drives?

A. It is owned by the partnership.

Q. By Woodlawn? A. Yes.

Q. Does Woodlawn own any other equipment?

A. Oh, yes.

Q. What would that be?

(Testimony of Ralph Little.)

A. Oh, office equipment, another truck.

Q. Where is that office equipment located?

A. At the present time it is at 424 Twelfth Avenue Road.

Q. Is it used any in the dairy?

A. It is in use; I use the equipment.

Q. At Home Dairies? A. Yes.

Q. How about the other Woodlawn truck?

A. It is on a standby basis, the truck; the route has to go every day, so we have to have an extra truck.

* * * * * [120]

Q. Do you know if it has ever been used on a standby basis for Home? A. No.

Q. You don't know, or it has not?

A. To my knowledge, it has not.

Q. (By Mr. Weil): Who maintains the trucks owned by Woodlawn?

A. They pay for that on a basis of the cost of the maintenance.

Q. (By Trial Examiner Bennett): To whom?

A. To us, to Home Dairies.

Q. In other words, Home does the maintenance for Woodlawn on a fee basis?

A. On a fee basis, and that is paid monthly.

* * * * * [121]

Q. (By Trial Examiner Bennett): Who does make policy for the Woodlawn Dairy?

A. Partners.

Q. All the partners?

A. No. Muller and myself generally.

(Testimony of Ralph Little.)

Q. Who in the Home Dairies corporation makes policy for Home Dairies?

A. The Board of Directors.

Q. That consists of whom?

A. The stockholders. It is a closed corporation.

Q. (By Mr. Weston): Who pays this employee over there? A. Woodlawn.

* * * * *

RALPH LITTLE

a witness recalled by and on behalf of the Respondent, having been previously sworn, was examined and testified further as follows:

* * * * * [124]

Direct Examination

Q. (By Mr. Weston): Let me clear it up this way, when was the first time that Mr. Baldwin or anyone representing the union talked to you about a union, in relation to the election?

A. Oh, Mr. Baldwin only talked to me once, and that was on the phone, but I don't remember the day.

Q. And what did he talk to you about?

A. He told me that we were telling our employees, making threats to them, and that we were making statements that were absolutely out of line and that he wanted it stopped.

Q. And that is when you told him that you weren't doing it yourself?

A. I was very much surprised. I had no knowledge of it whatever.

(Testimony of Ralph Little.)

Q. Did you assure him that the company would not make any such threats or statements?

A. Sure, I did.

* * * * * [127]

Q. Well, here is the letter that Mr. Baldwin wrote to you on July 18, that is in evidence.

Trial Examiner Bennett: You want the witness to see it?

Mr. Weston: Yes, please.

Trial Examiner Bennett: The record may show that the witness has been shown General Counsel's Exhibit No. 3.

Q. (By Mr. Weston): That letter, in that letter he states that he represents a majority of your employees and he demands that you bargain with him. Did you answer that letter? A. Yes.

Q. What did you state in that letter that you answered? [128]

A. That we would be willing to bargain with them after an appropriate election and showing that that was the case.

Q. And then it would be sometime after that that the election notice was posted on the bulletin board or shortly after that?

A. This notice came to me after Mr. Baldwin had talked to me on the phone. I think he told me on the phone that he was mailing it out that day.

Q. (By Trial Examiner Bennett): That he was mailing you the letter dated July 18?

A. Yes. I think he said he mailed it.

Q. (By Mr. Weston): So that after he talked

(Testimony of Ralph Little.)

to you about talking to the employees, then he set up this election and posted a notice on your bulletin board?

A. That was the next I knew about it.

Q. Now, can you tell us how long after he talked to you on the phone it was that the election was set up, just approximately?

A. I think it might have been the same day.

Q. Then, that first election was never held on that date, was it? A. That is right.

* * * * * [129]

Q. And this was on about the 26th of July?

A. That was the 26th of July.

Q. So that would be about 10 or 12 days after you had this conversation with Mr. Baldwin and after the time set for the first election?

A. Right.

Q. And was Mr. Baldwin at that meeting?

A. Sure.

Q. Did he make any complaints about you talking to your employees at that time?

A. Not a thing, not a thing.

Q. Was he perfectly in agreement with this election? A. He seemed to me.

Q. Was he?

A. I would say, definitely he was, yes.

Q. He made no objections to having an election?

A. Not a bit.

* * * * * [131]

A. Well, you see, it was determined that the count was 23 to 17, negative, and he folds up his

(Testimony of Ralph Little.)

ballots and he writes something to the effect on them that this was observed by the state or that it was conducted by so-and-so and signed his name on them and put them in his little brief case and locked up his little ballot box and stuck it under his arm and says, "Goodbye, boys. I will see you next year."

Q. He said he would see you next year?

A. Yes.

Q. How did you interpret that statement?

A. I interpreted it that he was going to be a self-invited guest next year.

Q. But not for a year, is that right?

A. That is the way he said it.

Trial Examiner Bennett: I suppose it might be construed as a solicitation to have another election.

Mr. Weston: Better luck next time, or something like that.

Q. (By Mr. Weston): And that is the last you saw of the state labor commissioner?

A. Yes, sir.

Q. What did Mr. Baldwin have to say at that time?

A. Baldwin took leave right after they verified the names.

Q. Did he have any talk with you?

* * * * * [135] A. No.

Q. Along about the 23rd of July, you consented to an election to be held by the National Labor Relations Board, didn't you? A. Right.

Q. That petition was withdrawn, wasn't it, by

(Testimony of Ralph Little.)

the Board? A. The 23rd of July?

Q. Sometime later. A. No.

Q. About August 1, didn't you receive a letter from the Board suggesting that your petition for an election had been withdrawn?

A. Yes, we had an election.

* * * * *

Q. With reference to this meeting that you had with the committee that has been talked about here today, there was some statement as to a statement that you made as to the company's position with [136] reference to raises or paying time and one-half for overtime. What did you tell the committee that day in that respect?

A. Well, to get up to the point where the statement was made, Mills was pressing me about certain hours and time and a half and so on, and "Will you do anything about it," and "This is our plan," and I merely made the statement that we were not at liberty to make any, to enter into any, agreements with the employees at this time due to the fact that the union was in the process of organization.

Q. Did you make any statement at that time about doing something when the union was washed up or something like that, or washed out?

A. I did not.

Q. Did anybody representing the company make that statement there that day?

A. That phraseology was never used.

Q. Was anything of that kind stated as to when

(Testimony of Ralph Little.)

you could make raises? A. No.

Q. The committee merely submitted a group of grievances or a list of demands and you discussed it pro and con and explained that you couldn't do it at that time, and did anything else happen at that meeting?

A. No, I don't think so. Everything that happened at the meeting was relative to wages and hours. * * * * * [137]

Cross Examination

Q. (By Mr. Weil): Who conducted it?

A. Gordon Mills was chairman of the employee group. [138]

Q. Who was chairman of your group? There were three of you there, weren't there?

A. We were there, all three of management.

Q. (By Trial Examiner Bennett): You had no particular spokesman? A. I don't think so.

Q. (By Mr. Weil): Wasn't that meeting held on the same day that the notices were first, or—yes, that the notices were first posted? A. Sure.

Q. You stated that you called Mr. Weston. Wasn't Mr. Weston already there at that time, or was that before or after he was there at the meeting?

A. Well, now, wait a minute. We called Weston, we called Weston, I think I talked to Mr. Weston in the morning. Mr. Robinson called in the morning and said there would be an election posted and I talked to him after that possibly.

(Testimony of Ralph Little.)

Q. When did Mr. Robinson come out to post the notices?

A. I don't know if he even posted them. He posted them during this time that we were in session in the employee meeting.

Q. It was after Mr. Robinson's call that you called Mr. Weston?

A. I called him after Mr. Robinson called Mr. Lawrence.

Q. Then Mr. Lawrence must have told you about Mr. Robinson's call? A. Yes. [139]

Q. In order for you to call Mr. Weston?

A. Yes.

Q. (By Trial Examiner Bennett): Is that right? A. Yes, that is right.

* * * * * [140]

Trial Examiner Bennett (interrupting): To who, now?

Mr. Weil: Mr. Helton.

A. At the meeting?

Q. (By Mr. Weil): Yes. A. As to what?

Q. As to the possibility of a wage increase being worked out.

A. Not that I remember. I don't remember of that.

Mr. Weil: That is all.

* * * * *

Redirect Examination

Q. (By Mr. Weston): After the election on the 26th, did you call me and ask me anything with reference to raises or pay increases? [141]

(Testimony of Ralph Little.)

A. Yes.

Q. What did I tell you?

A. You told me after the matter of representation had been settled by an election, we were free to proceed as we saw fit.

Q. Was it on that advice that you made your increases? A. Right.

* * * * *

(The document heretofore marked Respondent's Exhibit No. 1 for identification, was received in evidence.)

* * * * * [142]

RESPONDENT'S EXHIBIT No. 1

Department of Labor
State of Idaho
401 Sun Bldg., Boise

Home Dairy
Nampa, Idaho

July 16, 1952

Gentlemen:

By the provisions of Section 44-107 of the Idaho Code, this Department is required to conduct an election for the purpose of determining the bargaining agent of employees, whenever, requested to do so, either by the employer or the employees.

The employees of your establishment have requested such an election. Carrying out our usual practice, we have prepared notice of such election which must be placed in your establishment.

The election will be July 18, 1952, at the hour of

4:00 p.m. at your establishment in Nampa, Idaho. At that time all eligible employees in the voting unit who were on the payroll as of July 12, will be permitted to cast a secret ballot.

We ask that you designate some official of your company to act as an observer for the employer. We will permit the Union to have present one observer. After all have voted who desire to do so, the ballots will be tabulated and a certification made.

We would appreciate it, if you would have a list of the employees for our use at the election.

Yours very truly,

/s/ W. L. ROBISON,
Commissioner.

WLR:vs CC: Mr. Fred Baldwin, Sec. Teamsters Local No. 483.

JAMES MULLER

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * * [144]

Q. (By Mr. Weston): Coming down to your conversation with reference to the Cascade route, was some reference made to the Cascade route at this meeting with the committee?

A. Not with the committee, that I know of. That is, the committee that met with management?

(Testimony of James Muller.)

Q. Management, yes.

A. I do not to my knowledge have any, know of anything coming up, regarding that meeting.

Q. When was it that you discussed the Cascade route and with whom?

A. It must have been at a time earlier than the meeting, if it was discussed, and it has been discussed more than once, that route.

Q. I see.

A. Because that route has been a long route from the time the first man was on it, and it was always a long drawn-out route for hours, and it wasn't a paying route other than we had the hope that it would pay sometime, and we were willing to pay a reasonable wage, which we thought was reasonable at that time. I don't know exactly without checking the records what that was. And the man on the route was willing to take it under that wage and as far as any discussion on paying more, it never, to my knowledge, it never came up.

Q. You don't recall telling them that you were going to take [146] that route off?

A. I might have mentioned that more than once, probably before this union ever was mentioned in our organization. And it was subject to whether it would pay or depending on the conditions in the summer and winter. Today that route has dropped from six days to week to three days a week.

* * * * *

Q. (By Trial Examiner Bennett): You said

(Testimony of James Muller.)

something about the summer. Is that a route that fluctuates with the summer business?

A. It has, yes.

Q. You have more business there in the summer than in the fall? A. Yes, that is right.

Q. (By Mr. Weston): With reference to Mr. Hollenbeck's pay, he testified that he got a ten-dollar increase at a time when his hours were going down?

A. I think that was a five-dollar increase. The over-all picture, it was stated that all men got a five-dollar increase. On this one route, it was a long route at that time, and it was in motion that that route should have ten dollars more, ten dollars more a month if it continued as it was. And I believe, if I am not, I could be wrong, but I believe that there was three days or four days after the first of the month that this route changed from a ten-dollar-a-month-paying-more-route down to an average [147] route. And that happened two or three days after the first of the month. So there was a ten-dollar raise set for that route on account of it was a long route.

* * * * *

Q. What about this committee? How was it set up in the first place?

A. Oh, the committee was set up, it was brought to me, I think, more than once it was brought to me by Mr. Mills that "Jim, you had better do something," he says, "the men are all going to join the union and you don't want the union, the union is

(Testimony of James Muller.)

no good, it's [148] no good for your operation, and it was said that we should suggest it to you." And I said most of the fellows were getting along on the same compensation, that our operation was so I didn't know just what could be changed to make the fellows understand our method of what we can pay, so it was brought up to have a meeting, we should have regular meetings once a month or more, and he suggested getting a meeting up, that is, Mr. Mills.

Q. (By Mr. Weil): When did this take place?

A. This was taking place, I would say, possibly one week or two weeks before we had this one meeting, and we refrained from having a meeting when the union was dealing with the men and I think myself I kept from having a meeting with the men on that business, on that deal, because they were in organizing, formal organization.

Q. (By Trial Examiner Bennett): You said that he suggested the formation of the committee, is that right?

A. He suggested the formation of the committee, not how to go about it.

Q. What happened after he made that suggestion?

A. Well, I would say that just a regular conversation went on, there was nothing more done about it at that time, although I had a mind, in mind, having a meeting, and then it was brought up by me for more of the fellows to have a meeting, so with the knowledge of talking it over with the rest

(Testimony of James Muller.)

of our organization we decided to, I decided to, we decided to, meet with them on a meeting, so I suggested then to each division to sponsor a man and if [149] they wanted to meet, why, we would meet.

Q. (By Mr. Weston): Did you tell each department of the operation to pick a man?

A. I believe that is the way it went out.

Q. And then later on you had the meeting?

A. That was to give each department a chance to talk if they wanted to be represented that way. And at that time there had been no talk of any election. * * * * *

Cross Examination

Q. (By Mr. Weil): Can you tell me who the individuals were who suggested to you, you stated that first Mr. Mills suggested having a meeting and then the two others——

A. No, I couldn't, I wouldn't know, because I met with all the men, I talked with them all the time, I am around the premises all the time and I have no office and my job calls for talking to them, and so I have no way, the only reason I remember this conversation with Mills on that question is that he said, "You better do something, your men are going to go to the union and I [150] know a lot about the union and it's not good for your business."

Q. And you say that conversation took place two weeks before the meeting? A. I would guess.

(Testimony of James Muller.)

Q. (By Trial Examiner Bennett): Two weeks before the actual meeting?

A. Yes, and before the election.

Q. (By Mr. Weil): It was about the Fourth of July?

A. I wouldn't say to the date. I know it was ahead of the election.

* * * * * [151]

No. 14041

United States
Court of Appeals
for the Ninth Circuit.

HENRY THOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeals from the United States District Court,
for the District of Montana,**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-23-53

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

W. D. RANKIN and
ARTHUR P. ACHER,
Helena, Montana,
For Plaintiff and Appellant.

KREST CYR,
United States Attorney,
Butte, Montana,
For Defendant and Appellee.

In the District Court of the United States, District of Montana, Helena Division

Civil No. 524

HENRY THOL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the plaintiff, and for cause of action alleges:

I.

That this is a suit of a civil nature, and the United States District Court in and for the District of Montana has jurisdiction under the provisions of Sections 1346 (b) and 2674, Title 28 U. S. Code.

II.

That at all of the times herein mentioned, the Helena National Forest was a national forest duly established and under the supervision and control of the Forest Service, of the Department of Agriculture of the United States; that at all of the times herein mentioned, the westerly boundary of a part of said national forest was formed by the channel of the Missouri River, flowing generally in a northerly and southerly direction in the Gates of the Mountains area, from Hauser dam to the northwest corner of Section 18, Township 13 N, Range 2 West, M.P.M., a distance of about ten

miles; that at all of the times herein mentioned that portion of said forest area east of said Missouri River, extended eastwardly for a distance of several miles and constituted a primitive or wild area and one of the roughest areas in Montana east of the Continental Divide; that at all of the times herein mentioned a gulch known as Meriwether Gulch arising in high mountain country in said Forest several miles to the northeast extended to the west and descended and opened into the Missouri River in Section 19, Township 13 N, R 2 West M.P.M.; that at all of the times herein mentioned to the north of said Meriwether Gulch, a similar gulch known as Mann Gulch, approximately a mile therefrom, descended to and opened into the Missouri River separated from Meriwether Gulch by a high ridge extending to the easterly bank of said river, where said ridge terminated in a cliff-like precipice; that at all of the times herein mentioned, a similar ridge extended and formed the northerly side of said Mann Gulch which ridge likewise extended to the Missouri River; that at all of the times herein mentioned, the top of the aforesaid ridge between Meriwether and Mann Gulches, and the area within the aforesaid Mann Gulch for a distance of from two to three miles from the river in an easterly direction was covered with a dense stand of Douglas Fir, and Ponderosa Pine poles six to eight inches in diameter with some larger timber, and a heavy ground cover in the openings and in the less dense timber, of grass and weeds; that on August 5, 1949, said timber and ground

covering was in an extremely dry and highly inflammable condition.

III.

That on or about the 5th day of August, 1949, a fire started at a point near the top of the aforesaid ridge between Mann Gulch and Meriwether Gulch, about one-half mile to the east of the Missouri River; that said fire was discovered by United States Forest Service employees, at 12:25 p.m. and was observed by them from the air at approximately 12:55 p.m. on said date, and at that time was estimated to be about eight acres in size, and smoking strongly; that thereupon the officers and employees of the United States Forest Service in charge of said Helena National Forest at Helena made a request of the United States Forest Service, Region One, at Missoula, Montana, for fire fighters, qualified to descend by parachute from an airplane near the site of a fire, called smoke jumpers, to proceed to the site of said fire by air in an effort to control the same; that thereupon an airplane with smoke jumpers aboard was dispatched by officers and employees of said United States Forest Service from Missoula, Montana, including one R. Wagner Dodge, Foreman in charge of said smoke jumpers, and one Earl E. Cooley, as fire spotter; that included among the smoke jumpers was Henry J. Thol, Jr., son of plaintiff; that said airplane arrived at the fire location at approximately 3:10 p.m.; that thereupon it became the duty of said spotter Cooley, and said Foreman Dodge, acting in

the course of their employment, and pursuant to the duties incident thereto as employees of the United States, to select from the air a safe area for said men to descend by parachute from said airplane where they would not be trapped by the spreading flames of said fire; that after their descent to the ground, at all of the times herein mentioned, all of said smoke jumpers were under the direction and control of said Foreman Dodge, and were acting in the course of their employment and pursuant to the duties incident thereto as employees of the United States.

IV.

That when said smoke jumpers were dispatched from Missoula, said defendant, by and through its officers and employees in said United States Forest Service in charge of said men knew of the extremely rough area where said fire was located, and knew that the fire danger was extremely high by reason of a high temperature of from 92 to 97 degrees Fahrenheit, low humidity, with wind directions and intensity variable, and a burning index of 74, with 100 as a maxmium which could be measured; that said defendant, by and through its officers and employees in said United States Forest Service likewise then and there knew that the said area where said fire was located was a primitive area without roads, and without habitations occupied by persons in the immediate area.

V.

That notwithstanding the matters and things

aforesaid said defendant, by and through its officers and employees carelessly, recklessly and negligently dispatched said group of smoke jumpers to the site of said fire, and carelessly, recklessly, and negligently directed fourteen smoke jumpers, including Henry J. Thol, Jr., son of plaintiff, to descend by parachute to the ground near said fire at about four o'clock p.m. on said date, although said defendant by and through its officers and employees knew, or in the exercise of reasonable care and diligence should have known by reason of the time of day, temperature, humidity, and variable direction of the wind, the highly inflammable condition of the ground cover and trees in said area, and general topography that upon descending in the aforesaid area said smoke jumpers might be trapped and burned by said fire.

VI.

That before said smoke jumpers were directed to jump from said airplane, said spotter Cooley and said foreman Dodge observed said fire from the air and determined the point at which said smoke jumpers should land; that said employees of the United States then and there estimated the size of the fire at between fifty and sixty acres, burning on the top of the ridge between Meriwether and Mann Gulches, and on the slope of the southerly side of said Mann Gulch; that said defendant, by and through said employees could not accurately determine the extent to which said fire had spread by reason of the smoke arising from said fire; that

said defendant, by and through said employees in charge of said smoke jumpers crew, then and there carelessly, recklessly, and negligently directed said smoke jumpers to jump from said airplane so as to alight in the bottom of said Mann Gulch at a point about one-half of a mile northeast of said fire, although said defendant, by and through said employees, did not then and there know the exact extent of said fire and then and there knew, or in the exercise of reasonable care and diligence should have known that by reason of the time of day, temperature, wind conditions, highly inflammable condition of the ground cover and trees in said area, the general topography, and the fire as observed from the air, that upon descending in said Mann Gulch above said fire as aforesaid, said smoke jumpers might be trapped and burned by said fire.

VII.

That the airplane by which said smoke jumpers were transported to the area of the fire as aforesaid was equipped with radio instruments designed to permit persons in said airplane to communicate by radio with United States Forest Service officials when said smoke jumpers had landed, so that the Forest Service officials in charge of the suppression of said fire could be advised of the presence of said smoke jumpers and their location; that said defendant by and through its officers and employees carelessly, recklessly and negligently failed and omitted to keep said radio equipment in said airplane in repair and permitted and allowed said airplane to

be dispatched when the radio equipment was out of repair so that it would not work and accordingly, the Forest Service officers and employees were not notified of the landing of said smoke jumpers until said airplane had returned to Missoula at about 5:15 p.m. on said date; that if said radio equipment had been in repair and working properly, officers and employees of said Forest Service who arrived near the site of the fire on the ground on the westerly side thereof would have known where said smoke jumpers were and would and could have warned said smoke jumpers of the danger of being trapped by said fire in sufficient time for them to have escaped.

VIII.

That upon making descent to the bottom of Mann Gulch as aforesaid, the fire-fighting equipment of said smoke jumpers was likewise dropped from said airplane by parachute, including a radio transmitter and receiver, which was broken by reason of the failure of the parachute, to which it had been attached, to open; that by reason of the premises said foreman in charge of said smoke jumpers was unable to communicate by radio with the Forest Service officials having charge of the suppression of said fire.

IX.

That after making the descent as aforesaid said foreman Dodge in charge of said crew knew or in the exercise of reasonable care and diligence should have known, that the general course of said fire

might be up said Mann Gulch toward the point where said men had landed by reason of the wind conditions, the draft conditions caused by the heat of the fire, the nature and inflammable condition of the ground cover and trees and the general topography, but nevertheless said defendant by and through said employee in charge of said crew carelessly, recklessly and negligently failed and omitted to take any steps to scout said fire and determine the rapidity with which it was spreading and the area to which it had spread, taking into consideration the fact that said crew could not communicate with Forest Service officials by radio and thus be advised as to the extent of said fire, and carelessly, recklessly and negligently directed and required said men to occupy themselves assembling the equipment and supplies which had been dropped by parachute from said airplane for a period of approximately one hour, from 4 o'clock to 5 o'clock p.m. on said date, during which time, by reason of the location of said crew in the bottom of said gulch, the direction of spread of said fire could not be ascertained; that said defendant by and through its employee in charge of said crew carelessly, recklessly and negligently failed and omitted to require a sufficient number of men to ascend to high points on the ridges on either side of Mann Gulch or to take such other appropriate steps as might be necessary to ascertain whether or not said fire was spreading easterly up said Mann Gulch toward said crew, as in the exercise of reasonable care and diligence said foreman would have done; that said

defendant by and through said foreman in charge of said crew then and there carelessly, recklessly and negligently failed and omitted to require said smoke jumpers to proceed to the top of the ridge on either the northerly or on the southerly side of Mann Gulch to avoid being trapped and burned by the oncoming flames which might rapidly spread from the west to the east up from the bottom of aforesaid Mann Gulch, as said defendant by and through said foreman in charge of said crew, then and there knew or in the exercise of reasonable care and diligence should have known; that by reason of the time of day, temperature, wind conditions, highly inflammable condition of the ground cover and trees in said area, a very high fire danger existed and a "blow-up" might occur at any time, causing the flames to spread with such rapidity that said crew of smoke jumpers landed in close proximity of said fire as aforesaid, could not escape therefrom, but nevertheless said defendant by and through its said employee carelessly, recklessly and negligently failed and omitted to direct said crew to a place of safety or to take any steps to ascertain the extent to which said fire had spread so that said crew could seek a place of safety as in the exercise of reasonable care and diligence would have been done.

X.

That said defendant, by and through its officers and employees carelessly, recklessly and negligently failed and omitted to properly instruct said smoke jumpers prior to their arrival and after arrival at

the scene of said fire as to their duties in the event of an emergency arising whereby they might be in imminent danger of being trapped by the flames of a rapidly spreading forest fire or as to the feasibility and possibility of setting a fire to burn off an area into which they might retreat to avoid being burned by a spreading forest fire; that said defendant by and through its officers and employees carelessly, recklessly and negligently failed and omitted to train and adequately instruct said smoke jumpers with respect to their duties in the event of imminent danger of being trapped by a forest fire, and permitted said smoke jumpers, and particularly the said Henry J. Thol, Jr., to be dispatched on said date without adequate training and experience with respect to the possibility of setting an escape fire to burn off an area into which they might escape to avoid being burned by a spreading forest fire.

XI.

That said defendant by and through said foreman Dodge after 5:00 p.m. on said date, carelessly, recklessly, and negligently led and directed said crew of smoke jumpers to proceed down the aforesaid Mann Gulch until they arrived in close proximity to said forest fire at a time when he was without knowledge as to where said fire had spread, after observing that said fire was burning and spreading rapidly, and at a time when said fire had entirely crossed said Mann Gulch and was proceeding up the same with great rapidity toward said smoke jumpers, as said defendant in the exer-

cise of reasonable care and diligence would have known in time to have led said men to a place of safety and not to a place where they might be trapped and burned by said fire.

XII.

That thereafter said foreman carelessly, recklessly and negligently required said smoke jumping crew to proceed down said Mann Gulch toward the Missouri River, and in a direction in closer proximity to said fire until approximately 5:45 p.m., although said defendant, by and through its said employee, in the exercise of reasonable care and diligence would have directed said crew to ascend the ridge on the northerly side of Mann Gulch while approaching said fire, where they could and would have had a position of safety from which they could escape from the flames of said fire, and carelessly, recklessly and negligently continued to so proceed until said crew could observe that the route toward the river was cut off by the advancing fire, at which time the approaching flames were about five hundred feet from them; that thereupon said foreman Dodge directed said crew to turn back and endeavor to escape from said flames by ascending the ridge on the northerly side of said Mann Gulch; that thereupon said foreman Dodge carelessly, recklessly and negligently failed and omitted to warn said crew and particularly the said Henry J. Thol, Jr., of his intention to do so, but nevertheless carelessly, recklessly, and negligently lit a fire to burn off an area into which said crew might

escape when said defendant, by and through said employee knew, or in the exercise of reasonable care and diligence should have known that such a fir, set without knowledge of said Henry J. Thol, Jr., would and did impede his escape from said forest fire.

XIII.

That said Henry J. Thol, Jr., endeavored to escape by ascending the ridge on the northerly side of Mann Gulch, but failed to reach a place of safety, and on the contrary was engulfed by the flames of the forest fire, or of the fire set by said foreman Dodge, and by reason thereof was severely burned, causing personal injuries resulting in his death on said date.

XIV.

That each of the aforesaid negligent acts and omissions of said defendant United States of America, acting by and through its officers and employees in the United States Forest Service as aforesaid, was a proximate cause of the injuries and subsequent death of said Henry J. Thol, Jr.

XV.

That at the time of his death as aforesaid, said Henry J. Thol, Jr., was a minor of the age of 19 years; that he resided with his father, Henry Thol, the plaintiff above named; that said Henry J. Thol, Jr., had an expectancy of over 42 years; that plaintiff was of the age of 68 years, with an expectancy of over nine years; and it was reasonably likely that his son would live beyond the period of plain-

tiff's expectancy; that said Henry J. Thol, Jr., was a kind and affectionate son; that he was earning, and capable of earning in excess of $200 a month, and it was reasonably likely that as he grew older his earning power would increase; that said Henry J. Thol, Jr., had made some contributions to plaintiff in the past from his earnings, and if he had not died by reason of said injuries as aforesaid, it is reasonably likely that he would have made further contributions to the plaintiff in the future; that by reason of the death of the said Henry J. Thol, Jr., plaintiff has suffered the loss of the comfort, society, and companionship of his son, and contributions toward his support.

XVI.

That by reason of the premises, plaintiff has suffered damages in the sum of $35,000.00.

Wherefore, plaintiff prays for judgment against said defendant in the sum of $35,000.00, together with his costs herein incurred.

/s/ WELLINGTON D. RANKIN,

/s/ ARTHUR P. ACHER,
Attorneys for Plaintiff.

[Endorsed]: Filed August 2, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the Defendant above named and moves the Court that this cause be dismissed upon the following grounds, to wit:

That the complaint herein fails to state a claim upon which relief can be granted.

/s/ DALTON PIERSON,
United States Attorney for the District of Montana;

/s/ R. LEWIS BROWN, JR.,
Assistant United States Attorney for the District of Montana;

/s/ H. D. CARMICHAEL,
Assistant United States Attorney for the District of Montana, Attorneys for Defendants.

[Endorsed]: Filed October 3, 1951.

In the United States District Court for the District of Montana, Helena Division

No. 524

HENRY THOL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

The defendant's motion to dismiss having come on for hearing before the Court on the 7th day of

December, 1951, and the matter having been submitted to the Court upon briefs, and it appearing to the Court that under the provisions of Section 757 (b) of Title 5, U.S.C.A., the exclusive remedy of plaintiff herein is that provided by Chapter 15, Title 5, U.S.C.A.,

Now, Therefore, It Is Ordered that the defendant's motion to dismiss be, and the same hereby is, granted.

Done and dated this 12th day of June, 1953.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed and docketed June 12, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that the Plaintiff above named, Henry Thol, hereby appeals to the Court of Appeals for the Ninth Circuit from that certain order and final judgment entered in this action on the 12th day of June, 1953, in favor of the defendant, the United States of America, and against the plaintiff, Henry Thol, granting the defendant's motion to dismiss said action and from the whole of said order and judgment.

Dated this 10th day of August, 1953.

/s/ WELLINGTON D. RANKIN,
/s/ ARTHUR P. ACHER,
Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed August 11, 1953.

[Title of District Court and Cause.]

DOCKET ENTRY

Aug. 11, 1953—Mailed Copy Notice of Appeal to U. S. Attorney, Butte, Montana.

Attest a True Copy.

[Seal] H. H. WALKER,
Clerk

By /s/ ELIZABETH E. SPRINGER,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers are the originals filed in Case No. 524, Henry Thol, Plaintiff, vs. United States of America, Defendant, and designated by the Plaintiff as the record on appeal in said cause.

Witness my hand and the seal of said Court at Helena, Montana, this 16th day of September, A.D. 1953.

[Seal] /s/ H. H. WALKER,
Clerk as Aforesaid.

[Endorsed]: No. 14,041. United States Court of Appeals for the Ninth Circuit. Henry Thol, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed September 19, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14,041

HENRY THOL,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

Statement of Points on Which Appellant Intends to Rely

The United States District Court erred:

1. In granting the defendant's motion to dismiss;

2. In holding that the complaint on file herein fails to state a claim upon which relief can be granted;

3. In finding, holding and deciding that under

the provisions of Section 757 (b) of Title 5, U.S.C.A., the exclusive remedy of plaintiff herein is that provided by Chapter 15, Title 5, U.S.C.A.;

4. In not finding, holding and deciding that the complaint states sufficient facts to authorize recovery by the plaintiff against the United States under the Federal Tort Claims Act, Section 2674, Title 28, U.S.C.A.

Designation of Record

The appellant hereby designates the following portions of the record to be printed as material to the consideration of the appeal, namely, Complaint, Defendant's Motion to Dismiss, the Order and Judgment of the Court granting the Defendant's Motion to Dismiss, Notice of Appeal with date of filing, Entry in Civil Docket as to names of parties to whom Clerk mailed copy of Notice of Appeal, Designation of Contents of Record on Appeal filed in the District Court, and this Statement of Points and Designation of Record, and requests that the Bond on Appeal not be printed nor the appellant's Statement of Points filed in the District Court, agreeable to Rule 75, Federal Rules of Civil Procedure, inasmuch as said statement is identical with the statement of points hereinbefore set forth.

Dated this 28th day of September, 1953.

/s/ WELLINGTON D. RANKIN,

/s/ ARTHUR P. ACHER,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 29, 1953.

No. 14041

United States Court of Appeals

for the Ninth Circuit

HENRY THOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

Appeals from the United States District Court,
for the District of Montana,

WELLINGTON D. RANKIN,
ARTHUR P. ACHER
Attorneys for Appellant

NAEGELE PRINTING CO., HELENA, MONT.

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REPLY BRIEF OF APPELLANT

The Montana Case Cited Has No Application

Certain assertions in the Brief of the United States prompt this Reply Brief.

It is there stated: (P. 15)

> "Finally, there seems little doubt that if this case arose under the Montana Compensation Act, the non-dependent father could not recover for wrongful death. In Tarrant v. Helena Bldg. & Rlty. Co. (1944) 116 Mont. 319, 156 P. 2nd 168, suit was brought for the wrongful death in 1943 of a 13-year-old girl employed for $35.00 per month. The compensation Act was held to exclude the suit. It is true that the question of non-dependency was not expressly mooted, but the facts of non-dependency speak for themselves."

In the Tarrant case the suit was by the personal rep-

resentative of the decedent's estate. It was sought to avoid the Compensation Act by showing that decendent was a minor, illegally employed. The Court states:

> "Plaintiff was appointed as administratrix of the decedent's estate and, as such administratrix, brought this action to recover damages from the defendant Helena Building & Realty Company, a corporation, as owner and operator of the said office building on the alleged ground that its negligence was the proximate cause of the death."

The Court further stated:

> "No action for wrongful death existed at common law, the action dying with the injured person. However, the legislature is empowered to and it has provided that in certain cases the cause of action shall survive the death of the injured person.. (See sections 9075, 9076, and 9086, Rev. Codes.) That which the legislature is empowered to give, it is also empowered to take away. The legislature was empowered to enact the Workmen's Compensation Act. It was also empowered to enact the 1925 amendment to the Act. By such legislation the legislature *has taken from the injured workman, and in case of his death from his representatives,* certain cause of action and remedies theretofore available to them."

The Appellant Has Independent Rights as a Third Party

In Rocky Mountain Fuel Co. v. Industrial Commission, 105 Colo. 22, 96 Pac. 2d 413, the court said:

> "The Workmen's Compensation Act deals exclusively with matters growing out of the relation of employer and employee. The provisions of the act are binding upon employers and employees electing to be bound by them and upon none others. *All except employers and employees are strangers to the act, and their usual lawful rights and remedies are unaffected by it.*" (emphasis supplied.)

In Montana, of course, two independent causes of action would arise upon the death of a minor, excluding for the moment the effect of compensation laws. Thus in Burns v. Eminger, 84 Mont. 397, 405, 276 Pac. 437, the Court said:

> "In the case of an injury to a minor, there arise two causes of action—one in favor of the minor; the other in favor of the parents for loss of services during minority. In case of death, the action in favor of the minor survives and may be prosecuted by his administrator. (Melzner v. Northern Pac. Ry. Co., 46 Mont. 162, 127 Pac. 146; Burns, Admr., v. Eminger, above.) The independent action by the parent is authorized by section 9075, Rev. Codes of 1921 (Liston v. Reynolds, 69 Mont. 480, 223 Pac. 507).
>
> The recovery by a parent, as guardian ad litem of a living child, or as administrator of the estate in the surviving action, is no bar to a recovery by the parent in his own right for the damages which he has suffered by reason of the injury to his child."

We conceded in the opening brief that an action of the personal representative would be barred since the de-

cedent, if he had lived, would have been entitled to compensation. The Tarrant case goes no further.

Section 93-2809, authorizing the action by the parent for the death of his minor child was adopted from Section 376, California Code of Civil Procedure. The Montana Supreme Court held (1909) that "the construction given by the Courts of California and Washington meets with our approval." (Flaherty v. Butte Electric Ry. Co., 40 Mont. 454, 460, 107 Pac. 416.)

Durkee v. Central Pac. R.R. Co., 56 Cal. 388, 38 Am. Rep. 59, is cited by the Montana Court. There the court said:

> "It is, therefore, reasonable to presume, that the legislature had in view the principles of the common law as the same are applicable to cases of this character, and intended that the father should recover such damages as he has sustained, by way of compensation, leaving to the infant a further right of recovery of such damages as are personal to himself."

In Lange v. Schoettler (Cal) 47 Pac. 139, the court said:

> "It has been uniformly ruled that the action provided for in section 376, Code Civ. Proc., is a new action, and not the action which the deceased might have brought for the wrong had he survived."

The Tort Claims Act Should be Liberally Construed

In Gilroy v. United States (D.C.) 112 F. Supp. 664 the court said:

> "The purpose of the Federal Tort Claims Act was to abrogate the immunity of the United States against suit in tort. Its purpose was to make the United States liable to suit in tort in the same manner as anyone else. Unlike other statutes waiving governmental immunity, the Federal Tort Claims Act should be liberally construed in order to effectuate the purpose that was intended by its framers."

It is respectfully submitted that when the Federal Tort Claims Act was passed by Congress a cause of action arose in favor of a non-dependent father in Montana.

The question presented is whether or not the meaning of the exclusive liability provision of Section 757, Title 5 U.S.C. is so clear that the independent rights of a third party have been cut off.

It will be noted that the Supreme Court declined to pass upon the legal effect of similar language in the Longshoremen's and Harbor Workers' Act, in Halcyon Lines v. Haenn Ship C. & R. Corp., 342 U.S. 282, 96 L. Ed. 318, the court having stated:

> "Section 5 of the Act provides that, 'The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, ...' Haenn argues that this section provides the employer's exclusive liability thereby preventing a third party

> from having any right of contribution against an employer under the Act in cases where the joint negligence of a third party and the employer injure an employee covered by the Act. *We find it unnecessary to decide this question* which is treated by the cases cited in note 3, supra." (emphasis supplied.)

Conclusion

The government's contention is supported by Underwood v. United States (CCA 10) (November 4, 1953) 207 F. (2d) 862, which is in conflict with Hitaffer v. Argonne Co. 87 App. D. C. 57, 183 F. (2d) 811 upon which we rely.

The United States Supreme Court denied certiorari in the Hitaffer case, 340 U.S. 852, 95 L. Ed. 624.

In Underwood v. United States, supra, the court states:

> "Viewed in the light of the declared purposes * * *it becomes unequivocally plain, we think, that Congress intended the liability of the United States with respect to the injury or death of an employee to be exclusive *and in the place* of all other liability of the United States, not only to the employee, his legal representative, spouse, dependent, and next of kin, but 'anyone otherwise entitled to recover damages from the United States.* * * on account of such injury or death* * * under any Federal Tort liability statute."

Upon the other hand in Hitaffer v. Argonne Co., Supra, the Court took a directly contrary view, saying:

> "Moreover, it would be contrary to reason to hold that this Act cuts off independent rights of third persons when the whole structure demonstrates that it is designed to compensate injured employees or persons suing in the employee's right on account of employment connected disability or death. It can

> hardly be said that it was intended to deprive third persons of independent causes of action where the Act does not even purport to compensate them for any loss."

In the Legislative history of the 1949 amendment, to the Federal Employees' Compensation Act, as we pointed out in our opening brief, it is stated that the purpose of the amendment is to make it clear that the right of compensation benefits under the Act is exclusive "and in place of" any and all other legal liability to the end that needless and expensive litigation "will be replaced" with measured justice.

"In place of" implies the existence of something for which a substitution is being made, (Vancleave v. Wolf (Ind) 190 N.E. 371.)

"Replace" means "to fill the place of; to supply the equivalent for" (United States v. Mallery (D. C. Wash) 53 F. Supp. 564.)

If the Government's contention is correct, the right of appellant, a non-dependent father, was not replaced, but was cut off.

It is respectfully submited that the appellants in the four cases now pending here are entitled to the independent judgment of this court as to whether or not they have a cause of action, or are without a remedy.

Respectfully submitted,
WELLINGTON D. RANKIN
ARTHUR P. ACHER
Attorneys for Plaintiff
and Appellant

No. 14041

United States Court of Appeals

for the Ninth Circuit

HENRY THOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Appeals from the United States District Court,
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BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the District of Montana.

JURISDICTIONAL STATEMENT

This court has jurisdiction under the provisions of Section 1291, Title 28, U. S. Code, providing that the courts of appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, and Section 1294, Title 28, U. S. Code directing appeals to be taken from a district court to the court of appeals for the circuit embracing the district.

The plaintiff and appellant, Henry Thol, by the complaint seeks damages under the Federal Tort Claims Act on account of the death of plaintiff's minor son,

Henry Thol, Jr. who died as a result of personal injuries sustained on August 5, 1949, in a forest fire.

Under Section 2674, Title 28, U. S. Code[1] it is provided that the United States shall be liable in tort claims "in the same manner and to the same extent as a private individual."

The district court had jurisdiction by virtue of the provisions of Section 1346, Title 28, U. S. Code,[2] under which the District Courts have exclusive jurisdiction of civil actions against the United States for damages for death caused by the negligent or wrongful acts or omissions of any employee of the government while acting within the scope of his employment under circumstances wherein the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

1. Appendix I.
2. Appendix I.

STATEMENT OF THE CASE

The complaint charges that Henry Thol, Jr., minor son of the plaintiff, and a group of fourteen others, called smoke jumpers, required to descend by parachute from the air to suppress forest fires, were dispatched by officials of the U. S. Forest Service on August 5, 1949, to the site of a fire in the Helena National Forest near Helena, Lewis and Clark County, Montana (Tr. 1-15).

It is alleged that the United States, by and through its Forest Service officials, was negligent in dispatching the smoke jumpers under the existing conditions (Tr. 7); that the defendant failed to supply them with adequate equipment (Tr. 8); that the foreman in charge of the group was guilty of negligence, and that as a result of the negligence Henry Thol, Jr. was trapped by the fire and burned to death, (Tr. 14) the conflagration having trapped and caused the death of thirteen of the young men.[3] It is further alleged that the plaintiff, by reason of the death of his minor son, suffered the loss of the comfort, society, and companionship of his son, and contributions towards his support (Tr. 15).

The district court held that under the provisions of Section 757 (b), Title 5, U. S. Code[4] the exclusive remedy of the plaintiff was that provided by Chapter 15, Title 5, U.S.C.A., the Federal Employees Compensation Act, and the action was ordered dismissed upon the defendant's motion that the complaint failed to state a claim upon which relief can be granted.

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3. Life Magazine August 22, 1949.
4. Appendix III.

SPECIFICATIONS OF ERROR

The United States District Court erred:

1. In granting the defendant's motion to dismiss;

2. In holding that the complaint on file herein fails to state a claim upon which relief can be granted;

3. In finding, holding and deciding that under the provisions of Section 757 (b) of Title 5, U.S.C.A., the exclusive remedy of plaintiff herein is that provided by Chapter 15, Title 5, U.S.C.A.,

4. In not finding, holding and deciding that the complaint states sufficient facts to authorize recovery by the plaintiff against the United States under the Federal Tort Claims Act, Section 2674, Title 28, U.S.C.A.

ARGUMENT

The statement of points filed in the district court agreeable to Rule 75, Federal Rules of Procedure, and the Statement of Points filed in this court are identical with the Specifications of Error above set forth, and all present the single proposition that the district court erred in holding that the Federal Employees' Compensation Act is an exclusive remedy.

Plaintiff Would Have a Remedy Under Montana Law

Title 28, U.S.C.A., Section 2674, declares that the United States shall be liable for death caused by the negligent acts of a government employee under circumstances wherein the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[5]

Section 93-2809, R.C.M. 1947, provides that a father may maintain an action for the death of a minor child.[6]

Section 93-2810, R.C.M. 1947, authorizes recovery by the heirs for the death of one not a minor.[7]

In construing these provisions in Gilman v. The G. W. Dart Hardware Co., 42 Mont. 96, 99, 111 Pac. 550, the court said:

> "It will be noted that section 6485 relates to the injury or death of a minor child, while section 6486 refers to the death of a person not a minor, and the latter section expressly provides that in both cases such damages may be given as under all the circum-

5. Appendix I.
6. Appendix VI.
7. Appendix VI.

> stances of the case may be just. *There is no limitation upon the amount to be recovered in either case, except that it shall be a just award under the circumstances.* It is true that the right of a father to the earnings of his child is limited to the period prior to majority, but it does not necessarily follow that the pecuniary loss sustained in the death of a child is limited to what the child will earn before he becomes on age. On the contrary, the circumstances may be such as to indicate that such loss will be much greater."

Accordingly, the plaintiff in this action would have a claim for the death of his minor son under the laws of the State of Montana.

Plaintiff Not Dependent Cannot Recover Under the FECA

However, under the Federal Employees' Compensation Act, Title 5, U.S.C.A., Section 760,[8] as the statute existed at the time of the death, provided that compensation was payable to a parent "wholly dependent for support upon the deceased employee," and payments of compensation were to be terminated when said parent "ceases to be dependent."

The plaintiff in this action could not qualify as a dependent under the Federal Employees' Compensation Act. Under workmen's compensation acts generally, actual dependency is a prerequisite to the receipt of compensation. (100 A.L.R. 1090).

If the Compensation Act is held to be exclusive, the plaintiff is without a remedy, although under the laws of Montana a private individual would have been respon-

8. Appendix V.

sible to him in damages, and the court or jury in assessing damages could have considered loss of society and companionship, and amounts which the son may have contributed to his parent. if he had not been killed, although he was not legally obliged to make them.

FEDERAL EMPLOYEE'S COMPENSATION ACT

The Federal Employees' Compensation Act as enacted September 7, 1916[9] did not purport to provide an exclusive remedy.

The Act was amended July 1, 1944 (5 U.S.C.A. 757), to provide that one entitled to receive benefits under the Compensation Act and also under 'any other Act of Congress', 'shall elect which benefits he shall receive.'[10]

The plaintiff's son was killed August 5, 1949, (Tr. 14).

The Act was amended October 14, 1949, over two months later by adding a new subsection (b) providing[11]

> "The liability of the United States * * with respect to the * * death of an employee shall be exclusive, and in place, of all other liability of the United States * * to his legal representative, spouse, dependents, next of kin, and anyone else otherwise entitled to recover damages from the United States * * on account of such * * death."

The Act purports to provide that the amendment of October 14, 1949 be retroactive and "shall apply to any

9. Appendix II.
10. Appendix II.
11. Appendix III.

case of injury or death occurring prior to the date of enactment of this act."[12]

The court said in Ettor v. Tacoma 228 U.S. 148; 57 L Ed. 773, 778:

> "The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

In Koshkonong v. Burton 104 U.S. 668, 26 L. Ed. 886, 890, it is stated:

> "In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law."

In United States ex rel. Atty. Gen. v. Delaware & H. Co., 213 U.S. 366, 408, 53 L. ed. 836, 849, it was said:

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter."

12. Appendix V.

THE PLAINTIFF AND APPELLANT HAVING NO REMEDY UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT SHOULD NOT BE DENIED RELIEF

In Johansen v. United States 343 U. S. 427, 96 L. Ed. 1051 the Supreme Court in a five to four decision, held that even prior to the October 14, 1949 amendment, the Federal Employees' Compensation Act was an exclusive remedy, precluding recovery, by or on behalf of seamen of a "public vessel" under the Public Vessels Act.

However in Inland Waterways Corp. v. Doyle (CCA 8) 204 F. (2d) 874, the Eight Circuit held that notwithstanding the decision in Johansen v. United States, a seaman on a "merchant vessel" injured prior to the amendment to the Federal Employees' Compensation Act, and who could be held to be an employee of the United States, could nevertheless recover in an action filed in 1951 under the Suits in Admiralty Act, (46 U.S. C.A. Sec. 741 et seq). The latter act permits suits of seamen on vessels operated by the United States by libel in personam against the United States, the same as could be brought if the vessel were privately owned.

In Archer v. United States (D.C. Cal.) 112 F Supp. 651, it was held the parents of a cadet, killed in a plane crash, could not recover under the Federal Tort Claims Act, since the parents were dependent upon their son, and "under the law the plaintiffs are allowed compensation for the death of their son", citing Johansen v. United States, 343 U.S. 427, 96 L Ed 1051.

We contend that the Johansen case cannot in any event properly be construed to hold that one who does not

come within the provisions of the Federal Employees' Compensation Act, is nevertheless to be denied relief under the Federal Tort Claims Act.

The principle for which we contend we believe is recognized in Dishman v. United States (D.C. Md) 93 F Supp. 567, where it was held that one employed by the United States not injured in the course of his employment and hence not eligible to recover compensation, could recover under the Federal Tort Claims Act for injuries received while being treated in a Veterans hospital.

Likewise, in Canon v. United States (D.C. Cal) 111 F Supp. 162, 167 where a judgment of $123,904.65 was awarded a civilian medical secretary, an employee of the United States, for damages resulting from improper medical care at an army hospital, the court said:

> "The Johansen case, however, does not govern here as Johansen clearly sustained the injury for which suit was brought while in the performance of his duty. *While the Federal Employees' Compensation Act is the exclusive remedy of those who are injured in the performance of their duty, that Act cannot be held to prevent those individuals not covered by it from pursuing other remedies.* (Dishman v. United States, D.C. Md. 93 F. Supp. 567)"

It is submitted that the rule applicable is that recognized in Hitaffer v. Argonne Co. 87 App. D.C. 57, 183 F. (2d) 811, 23 A.L.R. (2d) 1366. There the husband having been injured received compensation under the applicable Workmen's Compensation Act for the District of Columbia. The wife brought action for damages for the loss of her husband's consortium.

The court held the wife was not barred by the Compensation Act, notwithstanding its broad terms as follows:

> "The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *"

The court said:

> "There can be no doubt but that this section is designed to make the employer's liability under this statute exclusive of any other liability either at law or in admiralty to the injured employee or anyone suing in the employee's right. But where a third person is suing in his or her own right on account of the breach of some independent duty owed them by the employer, even though the operative facts out of which this independent right and correlative duty arose are the same as those out of which the injured employee recovers under the Act, the Act does not proscribe the third person's cause of action."
>
> * * * *
>
> "Moreover it would be contrary to reason to hold that this Act cuts off independent rights of third persons when the whole structure demonstrates that it is designed to compensate injured employees or persons suing in the employee's right on account of employment connected disability or death. It can hardly be said that it was intended to deprive third persons of independent causes of action where the Act does not even purport to compensate them for any loss."

Any cause of actions which might have arisen to Henry Thol, Jr. in his lifetime, for pain, suffering, loss of earn-

ing power, could have been prosecuted after his death by his personal representatives under Section 93-2824 R.C.M. 1947 (9086 R.C.M. 1935).

But any such action we concede would be barred under the Federal Employees' Compensation Act, because if the decedent had survived he could have received compensation.

However, the plaintiff and appellant, would have had a cause of action under the law of Montana against a private person for the damages suffered on account of the death of his minor son, so it is submitted that the Compensation Act should not be held to prevent those individuals not covered by it from pursuing other remedies.

In Gibbs v. United States (D.C. Cal) 94 F. Supp. 586, the District Court held that the Federal Employees' Compensation Act was not an exclusive remedy for one injured prior to the amendment of October 14, 1949 and that a libelant could proceed under the Public Vessels Act. The decision of the lower court was rendered in 1950 and was affirmed by this court on December 9, 1952 (Gibbs v. United States (CCA 9) 200 F. (2d) 197.)

In the District Court Judge Goodman stated:

> "The 1949 amendments may be said to have some argumentative weight as indicative of Congressional awareness that up to that time the compensation statute was not the exclusive remedy of employees; or, to say the least, that there was grave doubt in the matter."

In the Legislative History of the Amendment of October 14, 1949 it is said that the purpose of subdivision (b)

"is to make it clear that the right of compensation benefits under the Act is exclusive *and in place* of any and all other legal liability of the United States." It is said that "an important gap in the present law will be filled and at the same time needless and expensive litigation *will be replaced* with measured justice" and that "the employees will benefit accordingly under the Compensation Act as liberalized by this bill".[12]

The right of the father to recover for the death of a minor son in Montana is a right separate and independent from that of the son for his own injuries. It is submitted that the Federal Employees' Compensation Act should not be held to cut off the independent rights of the father who could not receive benefits under the Compensation Act.

It is submitted that it was not the intention of Congress to cut off an existing right of action of one in the position of the plaintiff here. Hitaffer v. Argonne Co., 87 App D C 57, 183 F. 2d 811, 23 ALR 2d 1366; cert. denied, 340 U S 852, 95 L ed 624, permits a construction that the Federal Employees' Compensation Act does not bar the action by the Plaintiff.

12. Appendix V

It is respectfully submitted that the judgment of the District Court should be reversed.[13]

WELLINGTON D. RANKIN
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Attorneys for Plaintiff
and Appellant

13. Like appeals are pending in this court, No. 14042, Rene Roch, Appellant, v. United States of America, Appellee, No. 14043, Elliot I. Navon and Sylvia Navon, Appellants, v. United States of America, Appellee No. 14044, N. E. Thompson and Lucy Thompson, Appellants, v. United States of America, Appellee, on behalf of the parents of three other young men who perished in the same disaster. A stipulation is on file in each of the cases that a judgment or order may be made by the Court of Appeals in each of said actions identical to that entered in this case.

APPENDIX

Title 28, USCA, Section 2674 provides:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983."

Title 28 USCA, Section 1346, provides in part:

"1346. *United States as defendant*

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Title 5, U.S.C.A. Section 757 as enacted September 7, 1916.

"¶757. *Person receiving not to be paid for other services; pensions.* As long as the employee is in receipt of compensation under this chapter, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States. (Sept 7, 1916, c. 458, ¶ 7, 39 Stat. 743.)"

Title 5, U.S.C.A. Section 757 as amended July 1, 1944.

"¶757. *Person receiving not to be paid for other services; pensions.* As long as the employee is in receipt of compensation under sections 751-791, 793 of this title, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States: Provided, That whenever any person is entitled to receive any benefits under sections 751-791 and 793 of this title by reason of his injury, or by reason of the death of an employee, as defined in section 790 of this title, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the Administrator

may for good cause allow, and when made shall be irrevocable unless otherwise provided by law. As amended July 1, 1944, c. 373, Title VII, ¶ 705 (a), 58 Stat. 712; 1946 Reorg. Plan No. 2, ¶ 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Aug. 13, 1946, c. 958, ¶ 5, 60 Stat. 1049."

Title 5, U.S.C.A. Section 757, was amended October 14, 1949, by the act cited as the "Federal Employees' Compensation Act Amendments of 1949", including the following provisions:

"Sec. 201. Section 7 of the Federal Employees' Compensation Act, as amended (5 U.S.C., 1946 edition, sec. 757), is further amended by inserting the designation "(a)" immediately before the first sentence thereof and by adding to such section a new subsection reading as follows:

'(b) The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel.' "

"Sec. 303. (a) Except as otherwise provided by this section or in this Act, titles I and II of this Act shall take effect on the date of enactment of this Act and be applicable to any injury or death occurring before or after such date."

"(g) The amendment made by section 201 of this Act to section 7 of the Federal Employees' Compensation Act, making the remedy and liability under such Act exclusive except as to masters or members of the crew of any vessel, shall apply to any case of injury or death occurring prior to the date of enactment of this Act: *Provided, however,* That any person who has commenced a civil action or an action in admiralty with respect to such injury or death prior to such date, shall have the right at his election to continue such action notwithstanding any provision of this Act to the contrary, or to discontinue such action notwithstanding any provisions of this Act to the contrary, or to discontinue such action within six months after such date before final judgment and file claim for compensation under the Federal Employees' Compensation Act, as amended, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after enactment of this Act, whichever is later. If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy or liability under the Federal Employees' Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after final determination of such cause, whichever is later, be entitled to file a claim under such Act." (U. S. Code Congressional Service, 81st Congress, First Session, 1949, Volume 1, pages 866, 880.)

LEGISLATIVE HISTORY

"TITLE II—Technical Amendments

Section 201: Section 7 of the act would be amended by designating the present language as subsection "(a)" and by adding a new subsection "(b)."

The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill." (U. S. Code Congressional Service, 81st Congress, First Session, 1949, Volume 2, page 2135)

Title 5, U.S.C.A., Section 760, as amended July 28, 1945, provided:

"If death results from the injury the United States shall pay to the following persons for the following periods a monthly compensation equal to the following percentages of the deceased employee's monthly pay:

* * *

"(E) To the parents, if one is wholly dependent for support upon the deceased employee at the time of his death and the other is not dependent to any extent, 25 per centum; if both are wholly dependent, 20 per centum to each; if one is or both are partly dependent, a proportionate amount in the discretion of the commission.

* * *

"(G) The compensation of each beneficiary under clauses (E) and (F) shall be paid from the time of the death, until he, if a parent or grandparent, dies, marries, or ceases to be dependent, or, if a

brother, sister, or grandchild, dies, marries, or reaches the age of eighteen, or, if over eighteen and incapable of self-support, becomes capable of self-support. The compensation of a brother, sister, or grandchild under legal age shall be paid to his or her guardian."

MONTANA STATUTES

(Revised Codes of Montana, 1947)

"93-2809. (9075) *Parent or guardian may sue for injury or death of child or ward.* A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person."

"93-2810. (9076) *When representative may sue for death of one caused by the wrongful act of another.* When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

No. 14041

In the United States Court of Appeals for the Ninth Circuit

HENRY THOL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION

BRIEF FOR THE UNITED STATES

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Attorneys for the United States.

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CITATIONS

In the United States Court of Appeals for the Ninth Circuit

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION

BRIEF FOR THE UNITED STATES

JURISDICTION

The District Court's jurisdiction was invoked under the Tort Claims Act, 28 U. S. C. 1346 (b), by reason of a complaint filed August 2, 1951, to recover for the service-incident death of plaintiff's son, a civilian employee of the United States, on August 5, 1949 (R. 3–15).

This Court's jurisdiction is invoked under 28 U. S. C. 1291 by a notice of appeal, filed August 11, 1953 (R. 17), from an Order of the District Court, entered June 12, 1953, stating "that the defendant's motion to dismiss be, and the same hereby is, granted" (R. 16–17). The record does not contain a judgment which actually dismisses the action in accordance with the order granting the motion.

STATEMENT

According to the allegations of the complaint (R. 3–15), on August 5, 1949, plaintiff's minor son, a civilian employee of the United States Forest Service was killed in the performance of duty as a result of the negligence of his fellow employees.

On October 14, 1949, Congress amended the Federal Employees' Compensation Act so as to insert a declaration in express terms that the liability of the United States under the Compensation Act was exclusive of all other liability to any person on account of the service-incident death or injury of Government employees (Federal Employees' Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, 5 U. S. C., Supp. V, 751, 757 (b). The Supreme Court has held this amendment to be merely declaratory of the preexisting law (*Johansen* v. *United States* (1952), 343 U. S. 427, rehearing denied 344 U. S. 848). Out of abundant caution, however, Congress had taken the trouble to provide expressly that the declaration of exclusiveness should apply retroactively (Section 303 (g), 5 U. S. C., Supp. V, 757 note).

On August 2, 1951, plaintiff brought the present suit against the United States under the Tort Claims Act to recover $35,000.00 damages on account of "the loss of the comfort, society, and companionship of his son, and contributions toward his support" (R. 15). By an order, entered June 12, 1953 (R. 17), the District Court granted the Government's motion to dismiss, made on the ground that "the complaint herein fails to state a claim upon which relief can

be granted" (R. 16). A notice of appeal from the order of June 12, 1953, was filed August 10, 1953 (R. 17).

The complaint contains no allegations that plaintiff is a nondependent parent and as such is not entitled to benefits under the Federal Employees' Compensation Act. Plaintiff, however, both in the District Court and in this Court, has briefed and argued his case on the ground that, since he cannot collect benefits under the Compensation Act, it should not be read as excluding all other liability of the United States to him (e. g. Br. 8). In fact, of course, it appears that if plaintiff is the personal representative of the deceased minor, he is entitled to receive payment, under the Compensation Act, of burial allowance not to exceed $400.00 (5 U. S. C., Supp. V, 561).

ARGUMENT

I

The Federal Employees' Compensation Act, like other comprehensive systems of compensation, has been authoritatively construed as fixing the total liability of the United States for service-incident death or injury

1. The present case is on all fours with *Underwood* v. *United States* (10th Cir., 1953) 207 F. 2d 862, where it was held that a nondependent widower could not recover under local law for the death of his federally employed wife, although he could collect nothing under the Federal Employees' Compensation Act. The circumstance that plaintiff here is a nondependent father instead of a widower makes no difference. In rejecting the argument that because plaintiff could

collect nothing under the Compensation Act he should be able to recover under the Tort Claims Act, the Tenth Circuit said (pp. 863, 864):

> Section 757 (b) was enacted in 1949 as an amendment to the Federal Employees Compensation Act for the avowed purpose of making it clear "that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities * * *" S. Rep. No. 836, 81st Cong. 1st Sess. p. 23. Consistently with that declared purpose, the amendment has been authoritatively construed to preclude a suit for damages under the Public Vessels Act of 1925 (43 Stat. 1112, 46 U. S. C. A. 781 et seq.) for injuries to and wrongful death of crewmen on a public vessel. *Johansen* v. *United States,* 343 U. S. 427. And see also *Sasse* v. *United States,* 201 F. 2d 871; *Lewis* v. *United States,* 190 F. 2d 22. But in all of those cases, the suit was either by an employee or a legal representative entitled to the benefits afforded by the Compensation Act.
>
> Here, the plaintiff in suit was neither an employee nor a dependent widower under Section 755 (21) (d) (A), and being without remedy under the Act, it is earnestly argued that the exclusionary provisions of Section 757 (b) were not intended to bar a separate and independent common law claim for loss of consortium recognized under applicable Colorado law. The plaintiff is fortified in this position by a recent decision of the Court of Appeals for the District of Columbia. *Hitaffer* v. *Argonne Co.,* 87 U. S. App. D. C. 57, 183 F. 2d 811, 820, 23 A. L. R. 2d 1366 * * *.

With deference to the cogent reasoning of that great court, we must agree with our trial court that the language of the Act is too clear for doubt. While there are no other federal cases directly construing the application of the Act to a remediless claimant under the Tort Claims Act, comparable provisions of state workmen compensation acts have been uniformly construed to specifically bar an independent common lawsuit for loss of consortium. *Holder* v. *Elms Hotel Co.,* 338 Mo. 857, 92 S. W. 2d 620, 104 A. L. R. 339; *Napier* v. *Martin,* Tenn. Sup., 250 S. W. 2d 35; *Bevis* v. *Armco Steel Corp.,* 156 Ohio St. 295, 102 N. E. 2d 444; *Guse* v. *A. O. Smith Corp.,* 260 Wis. 403, 51 N. W. 2d 24; *Danek* v. *Hommer,* 14 N. J. Super. 607, 82 A. 2d 659, affirmed 9 N. J. 56, 87 A. 2d 5.

Viewed in the light of the declared purposes of Section 757 (b) and in the context of antecedent judicial construction of comparable provisions of state acts, it becomes unequivocally plain, we think, that Congress intended the liability of the United States with respect to the injury or death of an employee to be exclusive and in the place of all other liability of the United States, not only to the employee, his legal representative, spouse, dependent, and next of kin, but "anyone otherwise entitled to recover damages from the United States * * * on account of such injury or death * * * under any Federal tort liability statute." It is significant, we think, that the Congress chose to speak in terms of liability of the government, not in terms of remedies or rights of action, and in doing so, it gave a right of action only to the extent

> that it saw fit to relax governmental immunity from any liability.

It is elementary in such situations that, when Congress has occupied the field by a comprehensive statute, the local state wrongful death statute will not be permitted to afford a supplemental remedy to the non-dependents whom Congress has specifically excluded. E. g. *Lindgren* v. *United States* (1930) 281 U. S. 38, 42–43. We submit, accordingly, that the court below had no choice but to grant the Government's motion to dismiss the complaint.

2. The fact that the death of plaintiff's decedent, in the present case, as in the *Underwood* case, occurred prior to the enactment of Section 757 (b) cannot affect the liability of the United States. The Supreme Court has held the provision to be merely declaratory of the preexisting exclusiveness and Congress provided Section 757 (b) should be retroactive.

Even if construed as withdrawing a preexisting right of recovery, Section 757 (b) is controlling. It is elementary that Congress may withdraw the right to sue and recover against the United States at any time. *Lynch* v. *United States* (1934) 292 U. S. 571, 581; *Maricopa County* v. *Valley National Bank* (1943) 318 U. S. 357, 362; *DeGroot* v. *United States* (1866) 5 Wall. 419, 432. But, in fact, Section 757 (b) was only declaratory of the preexisting law under which compensation excluded all other liability. In *Johansen* v. *United States* (1952) 343 U. S. 427, the Supreme Court observed:

> * * * It is quite understandable that Congress did not specifically declare that the

Compensation Act was exclusive of all other remedies. At the time of its enactment, it was the sole statutory avenue to recover from the Government for tortious injuries received in Government employment. Actually it was the only, and therefore the exclusive, remedy. See *Johnson* v. *United States,* 186 F. 2d 120, 123 [343 U. S. at p. 433]. * * *

The purpose of the 1949 amendment is simply "to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States on its instrumentalities * * *." S. Rep. No. 836, 81st Cong., 1st Sess., p. 23 [pp. 436–437].

* * * * *

The Federal Employees Compensation Act, 5 U. S. C. §§ 751 *et seq.,* was enacted to provide for injuries to Government employees in the performance of their duties. It covers all employees. Enacted in 1916, it gave the first and exclusive right to Government employees for compensation, in any form, from the United States. It was a legislative breach in the wall of sovereign immunity to damage claims and it brought to Government employees the benefits of the socially desirable rule that society should share with the injured employee the costs of accidents incurred in the course of employment. Its benefits have been expanded over the years. See 5 U. S. C. (Supp. III) §§ 751 *et seq.* Such a comprehensive plan for waiver of sovereign immunity, in the absence of specific exceptions, would naturally be regarded as exclusive. See *United States* v. *Shaw,* 309 U. S. 495. Such a position does not

> run counter to the progressive liberalization of the right to sue the United States or its agencies for wrongs. This Court accepted the principle of the exclusive character of federal plans for compensation in *Feres* v. *United States,* 340 U. S. 135. Seeking so to apply the Tort Claims Act to soldiers on active duty as "to make a workable, consistent and equitable whole," p. 139, we gave weight to the character of the federal "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." P. 144. Much the same reasoning leads us to our conclusion that the Compensation Act is exclusive [pp. 439–440].
>
> * * * As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect [p. 441].

The decided cases have repeatedly applied this rule that a comprehensive system of compensation is exclusive unless it contains express provision for additional recoveries by suit. In the absence of a declaration that the act is an additional or alternate remedy, the statute must be read as being exclusive, mere absence of a provision such as was added by Section 757 (b), will not permit reading the statute as non-exclusive as plaintiff is insisting in the present case.

In the earlier case of *Feres* v. *United States* (1951) 340 U. S. 135, although the compensation statute made no provision for its exclusiveness, the Supreme Court said (at pp. 143, 144):

> We cannot ignore the fact that most states have abolished the common-law action for dam-

ages between employer and employee and superseded it with workmen's compensation statutes which provide, in most instances, the sole basis of liability.

* * * * *

This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

So in *Lewis* v. *United States* (1951) 190 F. 2d 22, the District of Columbia Circuit had to pass on the case of a U. S. Park policeman, whose compensation statute, like the government seamen in *Johansen* and the soldiers in *Feres,* contained no express declaration of exclusiveness. After quoting the foregoing language of the *Feres* case, the District of Columbia Circuit Court observed (at pp. 23–24):

> By parity of reasoning we think the same result must be reached in this case. Like the soldier in the *Feres* case, the Park Policeman obtains the benefit of "systems of simple, certain, and uniform compensation for injuries or death." Members of the Park Police are by congressional enactment entitled "to all the benefits of relief and retirement" furnished by the "policemen's and firemen's relief fund, District of Columbia." That "statutory scheme contemplates a broad system of relief by way of medical and hospital care and treatments, pensions, retirement. * * *" As was said in the *Feres* case, "If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other." 340 U. S. 135, 144. * * * And in view of the general policy of Congress not to permit Federal employees to recover under the Tort Claims Act for injury at work, it certainly would seem unwarranted to permit members of the Park Police—uniquely among Federal employees—to maintain suits for damages, since the nature of their work and the benefits they receive suggest the contrary result. See *Dahn* v. *Davis,* 258 U. S. 421, 432; *Dobson* v. *United States,* 2 Cir., 27 F. 2d 807.

* * * * *

This was also the view of the Fifth Circuit in *Posey* v. *Tennessee Valley Authority* (1938), 93 F. 2d 726, 728, where it said:

> * * * This compensation is the sole remedy ordinarily available to an injured employee of

> the United States because of the general refusal to permit suits for torts. It is not a gratuity or grace, but a measured justice operating on the same general basis as state compensation laws. We entertain no doubt that Congress can limit the remedy of injured employees of its instrumentality to this compensation. We have but little doubt that it so intended. The inconvenience, uncertainty, and consequent litigation that would at once arise if the laws of each state in which the employee might work should apply must have been foreseen.

See also Schneider, *Workmen's Compensation Law* (1941), §§ 89–154, esp. § 147, p. 421; Prosser, *Torts* (1941), p. 543; 71 Corp. Jur. p. 1480.

II

Plaintiff's suggestion that this Court should go into conflict with the previous decisions under the Federal Employees' Compensation Act is not justified

1. Plaintiff urges this Court that the rule of certain cases "permits a construction that the Federal Employees' Compensation Act does not bar the action by the plaintiff" (Br. 15). Plaintiff relies chiefly upon the case of *Hitaffer* v. *Argonne Co., Inc.* (D. C. Cir., 1950) 183 F. 2d 811, and upon certain cases where the employee's injury was not service-incident.

In the *Hitaffer* case, appellant's husband had received compensation under the Longshoremen's and Harbor Workers' Compensation Act (the District of Columbia workmen's compensation statute) for injuries suffered while in the employ of appellee. The appellant sued for loss of consortium resulting

from the negligent injury to her husband. The District of Columbia court held, contrary to "the unanimity of authority elsewhere," that a wife has a cause of action for loss of consortium resulting from a negligent injury to her husband. Then, upon the theory that the wife was a third party, suing in her own right on account of the breach of an independent duty owed to her by her husband's employer, the court held that she was not precluded from suing by the Longshoremen's and Harbor Workers' Compensation Act, which provided in language practically identical with that of the Federal Employees Compensation Act, that the liability of the employer under the Act shall be exclusive.

The novelty of the *Hitaffer* case is apparent. Previously, it was the all but unanimous holding that state compensation acts and the Harborworkers' Act alike were exclusive of recovery both by nondependents and by spouses claiming loss of consortium. The only prior decision under the Harborworkers' Act had dismissed an action for wrongful death brought by a nondependent. In *Rhinehart et al.* v. *T. Smith and Son* (La. App. 1943) 14 So. 2d 287, the nondependent brother and sister of the deceased sued the employer to recover damages under the Louisiana Wrongful Death Statute, Article 2315 of the Civil Code, as amended, or in the alternative for compensation under the Louisiana Employers' Liability Act or, as a further alternative, for damages under the Jones Act (Section 33 of the Merchant Marine Act of 1920, 46 U. S. C. 688). The Court found that the deceased employee was covered by the Longshoremen's

and Harbor Workers' Compensation Act and that the remedy under that Act was exclusive. In the opinion of the Court the circumstance that the non-dependent brother and sister of deceased were not entitled to benefits under the Compensation Act did not alter its exclusiveness. At page 292 the Court stated:

> Thus, it is apparent that plaintiffs have no right of action to sue for the death of their brother under Article 2315 of the Civil Code, since this right was specifically superseded by Congress in the Longshoremen's & Harbor Workers' Compensation Act. And, since it is well settled that the death of Rhinehart resulted from an accident arising out of and within the scope of his employment within the meaning of the Longshoremen's Act and that, if he had left dependents as defined by that statute, they would have been accorded the remedies therein provided, the state court is without jurisdiction to grant relief to plaintiffs under Article 2315 of the Civil Code.

See accord, under the Louisiana Workmen's Compensation Act, *Atchison* v. *May,* 201 La. 1003, 10 So. 2d 785, 788.

Under the California Compensation Act, the case of *Treat* v. *Los Angeles Gas & El. Corp.* (1927) 82 Cal. App. 610, 256 Pac. 447, similarly sustained the dismissal of a nondependent parent's action for wrongful death. In rejecting the argument which plaintiff repeats in the case here at bar, the California court said (256 Pac. at 450):

> Appellants assert that where no dependents survive the employee the conditions of compen-

> sation do not exist, and hence that the provisions of the act have no application to the rights of such nondependents to maintain any action to which they would have recourse without regard to the Workmen's Compensation Act. This idea results from a mistaken notion of the meaning of the term "conditions of compensation." The conditions referred to are: That an injury has occurred to someone; that the person injured was an employee; that at the time of the injury both he and the employer were subject to the compensation provisions of the act; that at that time the employee was performing a service growing out of and incidental to his employment; that he was acting within the scope thereof; and that the injury was proximately caused by the employment, not due to the employee's intoxication, or intentionally self-inflicted. If these facts exist, the conditions of compensation are present, and the identity of the person who may attempt to make a claim based upon the injury to the employee, or his relation to the latter, cannot in any way affect the application of the provisions of the act, or remove the case from that class where the "conditions of compensation" exist.

Accord: *Leong* v. *Postal Tel. Cable Co.* (1944), 66 Cal. App. 2d 849, 153 P. 2d 204; *Gerini* v. *Pacific Employers' Ins. Co.* (1938), 27 Cal. App. 2d 52, 80 P. 2d 499; *McLain* v. *Llewellyn Iron Works* (1922), 56 Cal. App. 58, 204 Pac. 869.

Where one spouse sues the other spouse's employer for loss of consortium, recovery has likewise been denied. *Holder* v. *Elms Hotel Co.* (1936), 338 Mo.

857, 92 S. W. 2d 620; *Sharp* v. *Producers Produce Co.* (1932), 226 Mo. App. 189, 47 S. W. 2d 242; *Swan* v. *Woolworth Co.* (1927), 129 Misc. 500, 222 N. Y. Supp. 111; *Danek* v. *Hommer* (1951) 14 N. J. Super 607, 82 A. 2d 659; *Bevis* v. *Armco Steel Co.* (1951) 156 Ohio St. 295, 102 N. E. 2d 444; *McVey* v. *Telephone Co.* (1927), 103 W. Va. 519, 138 S. E. 97; *Guse* v. *A. O. Smith Corp.* (1952) 260 Wis. 403, 51 N. W. 2d 24.

Finally, there seems little doubt that if this case arose under the Montana Compensation Act, the nondependent father could not recover for wrongful death. In *Jarrant* v. *Helena Bldg. & Rlty. Co.* (1944) 116 Mont. 319, 156 P. 2d 168, suit was brought for the wrongful death in 1943 of a 13-year-old girl employed for $35.00 per month. The Compensation Act was held to exclude the suit. It is true that the question of nondependency was not expressly mooted, but the facts of nondependency speak for themselves. It is impossible to believe that if there was merit in the point under Montana law, counsel or the court would not have failed to raise it in view of the decided cases appearing in the Pacific Reporter.

The unresponsive character of plaintiff's reference (Br. 12) to other cases which do not involve service-incident injuries, such as *Canon* v. *United States* (N. D. Calif., 1953) 111 F. Supp. 162 and *Dishman* v. *United States* (D. Md., 1950) 93 F. Supp. 567, is of course obvious. See also *Vesel* v. *Jardine Mining Co.* (1939) 110 Mont. 82, 100 P. 2d 75, 83. Those were cases not in the performance of duty. Cases where, in the words of the *Treat* case, the "conditions of

employment'' did not exist with respect to the injury; not cases where the injury, as in the instant case, was covered by the statute but the plaintiff was not a beneficiary included by the legislature.

2. The *Hitaffer* case has been adversely criticized by both courts and note writers. See 40 Calif. L. Rev. 464; 36 Cornell L. Rev. 151–156. The two cases, *The Tampico* (S. D. N. Y., 1942), 45 F. Supp. 174, and *Rich* v. *United States* (2d Cir., 1949) 177 F. 2d 688, cited in *Hitaffer* to support the principle that the exclusive clause in question did not preclude a third person's cause of action, have been distinguished by the Second Circuit in its opinion in *American Mut. Liability Ins. Co.* v. *Matthews* (2d Cir., 1950) 182 F. 2d 322. Those cases rest, obviously, upon the principle that, where the employer is under a contract, express or implied, to indemnify a third-party, the ''exclusive remedy'' clause has no application to the contract obligation.

The criticism of the *Hitaffer* case by the Supreme Court of Ohio in the case of *Bevis* v. *Armco Steel Corp.* (1951) 156 Ohio St. 295, 102 N. E. 2d 444, is especially well founded. There the wife of an injured employee sued for loss of consortium. It was conceded that she had such an action at Ohio common law. In holding that the liability of the employer under the Ohio Workmen's Compensation Act is exclusive, the court denied any right to recover for the violation of any independent duty owing to her by her husband's employer, saying (at p. 449):

> We do not believe that the authorities relied upon in the opinion in the *Hitaffer* case,

sustain the strained conclusion reached by the court in that case on the question, which is similar to the question involved in the instant case. Apart from those authorities, the only other reasons given in the opinion in the *Hitaffer* case for that conclusion, while they might properly be considered by a legislature in determining what meaning to express, should not justify a court in determining that the legislature expressed a meaning different from that which its language clearly indicates that it did express.

3. It is to be noted that the District of Columbia court in the *Hitaffer* case was defining a common law right of action which it held was not excluded by the Longshoremen's and Harbor Workers' Compensation Act in defining the liability of employers. In the case now at bar, this court is called upon to construe two acts of Congress—the Federal Employees' Compensation Act and the Federal Tort Claims Act—and their relationship to each other as congressional expressions of waiver of sovereign immunity. The basic question is whether it was the intent of Congress in defining the exclusive liability of the United States under the Compensation Act to make an exception of any cause of action which a nondependent father might otherwise have under the wrongful death statute of a state for the death of his child.

There is no question of the authority of Congress to bar the independent right of a third person, as well as the right of an employee and rights derived through him. (See *supra,* p. 6.) The language of 5 U. S. C. 757 (b) certainly purports to bar such a

cause of action and, it is believed, in view of the exclusive character accorded to the Federal Employees' Compensation Act in the absence of section 757 (b) by the cited decisions (*supra,* pp. 6–11), it must not be construed as permitting suit by a nondependent father which would previously have been forbidden because not expressly authorized by the original Compensation Act.

CONCLUSION

For the foregoing reasons, the decision of the District Court granting the Government's motion to dismiss should be affirmed.

WARREN E. BURGER,
Assistant Attorney General,
KREST CYR,
United States Attorney,
LEAVENWORTH COLBY,
Special Assistant to the Attorney General,
Attorneys for the United States.

JANUARY 1954.

U. S. GOVERNMENT PRINTING OFFICE: 1954

No. 14047

United States
Court of Appeals
for the Ninth Circuit

RALPH H. EATON FOUNDATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

**Petition to Review a Decision of
The Tax Court of the United States.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-18-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Petitioner:

MARTIN H. WEBSTER, ESQ.;

H. M. WEBSTER, C.P.A.

For Respondent:

H. B. MUIR, ESQ.;

R. E. MAIDEN, JR., ESQ.

In The Tax Court of the United States

Docket No. 30985

RALPH H. EATON FOUNDATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION

It is hereby stipulated by and between Ralph H. Eaton Foundation, Petitioner, and the Commissioner of Internal Revenue, Respondent, by their respective counsel, that the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to object at the hearing to any part thereof on the grounds of immateriality, or to introduce other and further evidence not at variance with the facts herein stipulated.

* * *

12. The facts set forth in this Paragraph 12 relate to the farming operations of Petitioner:

(a) To enable Petitioner to engage in the farming business, Ralph H. Eaton and Frances M. Eaton, in March, 1947, gave to Petitioner without consideration certain farm and office equipment described as follows which had been purchased by Ralph H. Eaton and Frances M. Eaton in October and November, 1946 at cost figures indicated below:

John Deere Tractor & Tools	$1,565.68
Weed Burner and Spray	18.34

Land Roller	177.84
Four-Drawer Office File	81.80
Total	$1,843.66

Ralph H. Eaton and Frances M. Eaton further transferred to Petitioner at or about that time all their right, title and interest in and to certain growing crops against which they had advanced to the date of said transfer the sum of $3,520.79; and Petitioner agreed to pay said sum to Ralph H. Eaton and Frances M. Eaton.

* * *

13. The facts set forth in this Paragraph 13, relate to the real estate selling operations of Petitioner:

(a) In April and May, 1945, Ralph H. Eaton purchased 110 acres of land on West McDowell Rd., between 33rd & 35th Avenues, in Phoenix, Arizona, and transferred the same to the Phoenix Title and Trust Company, Phoenix, Arizona, as Trustee, under the latter's Trust Agreement Nos. 605 and 660. The intent and purpose of such acquisition was to subdivide said land, and said land was in fact subdivided into lots. At or about the time of acquisition of said land, a 1/10th interest therein was sold to George Heiskell. On April 1, 1947, Ralph H. Eaton and Frances M. Eaton gave to Petitioner without consideration their remaining 9/10ths interest in and to said Phoenix Title and Trust Company Trusts. At a meeting of Board of Directors of Petitioner duly held on April 1, 1947, Petitioner accepted said gift. At the time of said

gift, the net cost to Ralph H. Eaton and Frances M. Eaton of the donated interest was $27,410.62.

* * *

14. The facts set forth in this Paragraph 14 relate to the construction operations of Petitioner.

* * *

(c) At a meeting of the Board of Directors of Petitioner held on January 1, 1948, Ralph H. Eaton and Thomas H. Kent, Jr., met with George Heiskell and after some discussion it was agreed between Petitioner and George Heiskell that Petitioner would purchase the interest of George Heiskell in and to said partnership of Eaton & Heiskell Construction Co., for the book value thereof as determined by a Certified Public Accountant. At said meeting, Ralph H. Eaton also gave to Petitioner without consideration his interest in and to said partnership, and Petitioner duly accepted said gift. From January 1, 1948, Petitioner has operated a construction business under the name of Eaton & Heiskell Construction Co.

* * *

16. Ralph H. Eaton and Frances M. Eaton have each contributed a great amount of time and effort to generally supervise the activities of Petitioner.

* * *

Dated: May 20, 1952.

/s/ MARTIN H. WEBSTER,
Counsel for Petitioner.

/s/ CHARLES W. DAVIS, ECC

Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

Filed May 20, 1952, T.C.U.S.

The Tax Court of the United States

Docket No. 30985

RALPH H. EATON FOUNDATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PROCEEDINGS

May 20, 1952—10:15 A.M.

(Met pursuant to notice.)

Before: Honorable Clarence V. Opper, Judge.

Appearances:

MARTIN H. WEBSTER,
Appearing for the Petitioner.

R. E. MAIDEN, JR.,
(Honorable Charles W. Davis, Chief Counsel, Bureau of Internal Revenue),
Appearang for the Respondent.

RALPH H. EATON

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows: [13*]

* * *

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Ralph H. Eaton.)

Direct Examination

By Mr. Webster:

Q. Will you please state to the court, Mr. Eaton, the purpose in your own mind for the formation of this foundation?

A. Exactly as stated in the articles, foster and promote Christian, religious, evangelistic, missionary endeavors and enterprises.

Q. Now, it has been stipulated that your wife was also an incorporator and a director of the Petitioner during the tax years involved here. Did you discuss the matter of the formation of the Petitioner with your wife prior to March, 1947?

A. Yes, certainly. I believe I told her about my vision and desire immediately upon my return from New York.

Q. What was her attitude?

A. She was definitely interested also. We see eye to eye on those things. She goes right along with me. Our views and our ideas are very nearly always the same. [20]

* * *

Q. In your discussions with your wife in connection with the establishment of this foundation, did any of those discussions relate to the matter of your family finances?

A. Yes, because certainly my family was involved. My boy, the oldest son, who is 16 years old, is particularly interested and always is when he

(Testimony of Ralph H. Eaton.)

can get in on a conversation with my wife and I about the foundation; he is very happy about it. Even my daughter, 12 years old, is interested to a certain extent. She doesn't understand it all, of course, but my son is very anxious to have a part in it. In fact, he has asked me and he is planning to become one of the directors of the foundation. I might state that we plan, if his interest continues, to make him a part of it and perhaps the other children.

Q. Now, Mr. Eaton, I had asked you whether in your discussions with your wife, you had discussed the matter of the effect of the foundation upon your family finances. Had you had such discussions with your wife?

A. Yes. Excuse me for sidetracking you. We certainly have, but stating it frankly, we have an income that is sufficient for our family. We don't require a large income. I think my family and I live on a moderate income, and our [21] interest above that is, sir, frankly, to give to the Lord's work, and that position is borne by each of the members of the family, particularly by my wife, of course. [22]

* * *

Q. Now, in the discussions that you had and which you have testified to with your wife and Mr. Kent, was there any discussion as to the manner in which the foundation was supposed to fulfil the purpose which you say was in mind at the time of the formation?

(Testimony of Ralph H. Eaton.)

A. Well, if I may state it this way, we wanted to give funds and money to Christian work.

Q. Was there any discussion as to the manner in which those funds were to be acquired by the foundation?

A. Well, naturally there would have been. Our discussions would be along the lines of gifts and entering into various other phases of business that would produce income for the purpose of giving it to these Christian organizations that we had an interest in and a desire to help. [23]

* * *

Q. Now, it has been stipulated that the foundation entered into four different kinds of businesses, farming, construction, selling sport clothes and the selling of real estate lots. It has also been stipulated that the farming business was conducted during the two tax years that are involved here, that the subdivision business was conducted during the two tax years that were involved here, and that the construction business was undertaken from January 1, 1948, and on during the balance of period involved here, and further that the sale of the sport clothes was conducted during the period from June 2, 1947, to June 1, 1948. Would you state to the court why it is that the foundation entered into these businesses?

A. Yes. We wanted to have money available, earn money [24] for giving, contributing to Christian activities just as I have stated before.

(Testimony of Ralph H. Eaton.)

Q. Now, were there discussions among the directors of the foundation when the foundation entered into a particular business?

A. Definitely so, yes, always.

Q. Was there complete agreement at all times?

A. In every case. [25]

* * *

Q. Now, in connection with the farming operations of the foundation. It has been stipulated that you leased certain lands to the foundation. I would like to ask this question of you as to the manner in which the rent was determined, [32] that would be charged to the foundation in each case.

A. We determined it on a fair and equitable basis, and in every case the rent was not more than the average rental, going rental rate in the area, in the district. Sometimes less.

Q. Could you explain how you arrived at the average rental in the area?

A. Well, that was very easy in my particular case, because I happen to handle the leases for the Eaton Fruit Company, and we rent thousands of acres, I mean, we have rented thousands of acres over the years, and through that medium I know what land is renting for. Besides, it is a common knowledge in the produce business of what land, what other shippers and growers are paying for similar land. [33]

* * *

Q. Now, when you acquired this Swant ranch in

(Testimony of Ralph H. Eaton.)

July 1, 1948, and then leased it to the Petitioner for a year at $40 per acre per year, would you state your opinion as to whether that rental was equal to, less than, or greater than the average prevailing rent to comparable land in this area?

A. I would say that it certainly was not more than the average rental. If anything, it would be a little less, because the rental figure had started upward, I mean it had come upward all of those years.

Q. Well, now, when you say that the rental figure came up all of those years, what do you mean?

A. Back in 1943, along in there, there started a gradual climb of rentals for land. Another reason we set the [36] figure at that, was the fact that immediately after purchasing the ranch, we started improvements on the ranch and several thousands of dollars in improvements were added to the ranch.

Q. You say, "we added improvements to the ranch." Who do you mean?

A. The foundation. I am speaking of the foundation when I say that. When I say improvements in that particular case, that was myself personally. I beg your pardon. I personally paid for the improvements. The foundation only rented the land and paid the rent and received the benefits of the improvement.

Q. Approximately what was the cost of those improvements that you are talking about?

A. I don't recall the exact amount, but I would

(Testimony of Ralph H. Eaton.)

say that there was $2,500.00 to $3,000.00 worth of improvements in about that period. [37]

* * *

Q. Turning again to the original question that I asked you, the $40.00 per year that you leased the Swant ranch for to the foundation, I would like to hear it again whether it was equal to, greater than or less than the average rental.

A. Equal to or less than. There has been too much of a variance there, because there are different figures depending on the location of the land and the fertility of the soil and availability of water. That is one of the biggest questions in Arizona, of course. [38]

* * *

Q. I will now call your attention to the so-called "Mann Lease" which is described on page 8 and page 9 of the stipulation that is on file. According to that stipulation the foundation leased this ranch from T. A. Mann for a period from August 1, 1947, to July 31, 1948, at a rental of $35.00 per acre per year. I ask you whether that rental was equal to, greater than, or less than the average rental for comparable land in this area.

A. I would say for comparable land that it was about in line, perhaps just a little bit lower because the fertility of that particular piece of land had gone down somewhat through continuous farming.

Q. Well, if the fertility was reduced, would that

(Testimony of Ralph H. Eaton.)

make the rent higher than the average or lower than the average?

A. Lower than the average. [39]

* * *

Q. I will call to your attention the "L Avenue Ranch Property" which is described on pages 6 and 7 of the stipulation on file. This property was leased by you to the foundation from February 1, 1947, to January 30, 1948, at $40.00 per acre per year. Now, this was roughly during the same period that the Petitioner leased the Swant ranch from Mr. Swant at $30.00 per acre per year, and the Mann ranch at $35.00 per acre per year. Would you explain how it is that the "L Avenue Ranch" was leased at a higher rental than the other two ranches?

A. Well, in the first place, I personally had leased [40] that "L Avenue Ranch" to Eaton Fruit Company for $40.00 previous to this date which you have mentioned. I was receiving $40.00 per acre. Then, too, there was included in this lease——

Q. Pardon me. In what lease?

A. In the "L Avenue Lease" by the foundation, improvements which included a house, barns, a domestic well and all of those things for farming. The house alone had been rented for $85.00 a month.

Q. Now, when the "L Avenue" property had been rented by you to Eaton Fruit Company at $40.00 per acre per year, as you testified, did that $40.00 per acre per year include the use of the whole place that was on the property?

(Testimony of Ralph H. Eaton.)

A. No, it did not. No, I received that separately. The improvements were not included.

Q. You testified that as to the foundation, however, when you leased it for $40.00 per acre per year, it did include the use of it?

A. Mr. Eastes, the foreman, occupied the quarters there. [41]

* * *

Q. I will call your attention to the Ramona Road lease which is described in the stipulation on pages 7 and 8. Now, the stipulation shows that on or about April 1, 1948, you purchased 40 acres of farm land on Ramona Road in Phoenix, and that on April 1, 1948, you leased 35 acres of it to the Petitioner from April 1, 1948, for a full year at $40.00 per acre per year. Would you be able to state whether this rental charge was equal to, greater than, or less than the average rental in the area for comparable land?

A. I would say that in this particular area it was less than the average rental. That happens to be in a section of Phoenix, which was growing with subdivisions and the land was more valuable, therefore required a greater rental figure. There, then, there were improvements on that ranch also. [42]

* * *

Q. I will call your attention to the Rousseau lease for the Rousseau ranch, described on page 8 of the stipulation. That shows that for six months, from July 1, 1949, the foundation purchased it and leased the Rousseau ranch at a rental rate of $60.00

(Testimony of Ralph H. Eaton.)

per acre per year. Would you state whether that was equal to, greater than, or less than the average rental in the area for comparable land?

A. I would say about equal to. It happened to be that we only leased that for a half year and only through the friendship of the foundation foreman and the owner, Mr. Rousseau, were we able to get it because other companies were bidding on it and he could have rented it for $30.00. [More.]

Q. Is the Rousseau ranch located in an area comparable to any of the other locations of ranches which the Petitioner also leased?

A. Yes, within a mile.

Q. Of what?

A. Of the Swant ranch, a mile and a half.

Q. Of the Swant ranch? A. Yes. [43]

* * *

Q. Now, Mr. Eaton, in the tax return that was filed by the foundation for the fiscal year ending January 31, 1949, and which constitutes Exhibit No. 6-F, I believe, attached to the stipulation, there is shown an item of interest in the sum of $1,088.58 paid to Ralph H. Eaton, Phoenix, Arizona; is that you? A. That is right.

Q. Would you explain the circumstances for that interest payment?

A. Well, we had to have money to operate the foundation, and the foundation didn't have a credit standing with the bank sufficient enough to borrow money, at least, and I borrowed the money personally at the bank in my own personal name, and in

(Testimony of Ralph H. Eaton.)
turn loaned it or advanced it to the foundation. Naturally, I had to pay interest at the bank, therefore, from a business standpoint I charged interest to the foundation. Even more that that, I couldn't afford to do more than that. I had already given—like I have stated, there is just a limit to what one can do. There is a limit to what one can do in the way of giving.

Q. What is the comparision between the amount you charged the foundation as interest and the amount that you paid over to the bank as interest for the same amount of money? [44]

A. I think that the interest rate would be the same. Actually, I believe, the records will indicate that I paid about $1,400.00 in interest that year, and I received from the foundation something over a thousand, a little over a thousand.

* * *

Q. So, that apparently according to your testimony the only items of tangible value that you received were rent, this interest item that we talked about, a payment for costs advanced by you on growing crops, and repayment of loans. Is that correct? [45]

A. That is right. I would like to state I have never received any compensation for services rendered to the foundation in any way whatsoever, and never intended to. We made it very definite and plain right from the beginning before it was ever

(Testimony of Ralph H. Eaton.)

incorporated that there would never be any compensation to me personally, nor to my family.

* * *

Q. Now, do either you or your wife expect to receive at any time compensation for services that you rendered during [46] the tax years here in question?

A. No, definitely not. That is very definite.

Q. I ask you whether the foundation during the tax years here involved ever engaged in carrying on propaganda or otherwise attempted to influence legislation?

A. No, we haven't. That isn't our purpose at all.

Q. Now Mr. Eaton, let me ask you this question; do you have any immediate plans for the dissolution of the foundation?

A. Yes, we have gone into that, as far as dissolving it. We do expect to go on and on. I want my family to be part of it and carry it on indefinitely. I don't know how long, of course, but long after I am gone.

* * *

Q. Now, do you happen to know, Mr. Eaton, what happens [47] to the assets of the foundation in the event of a dissolution of that foundation?

A. Well, that has been a question in Arizona, from the attorney who drew up the Articles of Incorporation. He couldn't find any definite cases, as I recall him stating to me on that, but it has been our belief and understanding between the board of

(Testimony of Ralph H. Eaton.)
directors, Thomas Kent and my wife and the attorney and everbody that has been involved, or had anything to do with the foundation, that the money would be distributed to the charities, the approved charities as listed in the bylaws in the Minute book and would go definitely for the causes for which it was set up.

* * *

Q. When did you have these discussions with Mr. Weaver on the question of what happens to the assets of the foundation on dissolution?

A. At the time we set it up, we went into thorough details about those things. It was understood that that would be a point. We are now preparing and planning and working on a change in the bylaws or articles, whatever it takes to [48] effect that, so that it will conform with Arizona law, that positively nothing can accrue or come to me or my family in case of dissolving the foundation. That is definitely understood. My family understands that. Tom understands that. We never had any other desire or intention. I realized when I made a contribution to set up the foundation of $50,000.00 that I had known that none of that money, not one penny of it, could ever come back to me in any way. I knew that when I gave it. [49]

* * *

Q. Well, now, let me ask this question. Until this last month or so, as you say, what was your understanding, if any understanding, that you had

(Testimony of Ralph H. Eaton.)

on the question of what happened to the assets of the foundation upon dissolution?

A. Well, like I stated before, it has always been in my mind and I have always understood and have taken for granted that the money, the assets of the foundation would go to the charities and to the Christian organizations that are listed in the Minute book, those approved, because that is what it was set up for in the first place, and there is no desire to do anything else with it. There has never been any idea of anything else.

Q. Is your testimony then, to the effect that within the last month or so, you have learned that possibly that would not be true. Is that your testimony?

A. Well, something to that effect, but we want to make it so that it is definite and specific, so that it can't be otherwise, and propose to do that just as quickly as possible. [50]

* * *

Q. Mr. Eaton, I refer your attention to Exhibit 3-C, which is attached to the stipulation that is on file, and I direct your further attention to question number 16 which is contained on page 3 of that exhibit, that exhibit being the exemption affidavit that was filed by the foundation.

Question number 16 reads as follows: "In the event of the dissolution of the organization, what disposition would be made of its property?"

Apparently, the answer that was typed in, it was

(Testimony of Ralph H. Eaton.)

to be disbursed to charitable and religious organizations.

According to the exhibit, you signed this form as president of the foundation on June 15, 1948. Would you kindly state whether or not that represented your understanding of the situation at that time? A. It did.

Q. Is that your understanding of the situation today?

A. Well, it has been brought to my attention only recently and that because of filing a new exemption under the new 1950 Revenue Act, I believe by our attorney, that we should take steps to amend our articles to specifically carry that provision out as it is stated. [63]

* * *

Cross-Examination

By Mr. Maiden: [64]

* * *

Q. But you do recall that that question did arise at [65] the time you were incorporating?

A. I would like to restate again that my desire and my intentions and my statements to him and to everyone else concerned with the foundation was that there never would accrue to me in any way, nor to my family, anything from the foundation. I stood on that and he being my attorney was supposedly to follow through. I relied on his judgment in setting it up. I state again, as is outlined in this exemption,

(Testimony of Ralph H. Eaton.)

I never had any understanding whatsoever other than the fact that if the foundation was dissolved that the assets and everything left would go to the charities for which it was intended to go.

Q. You were aware, were you not, Mr. Eaton, that under the Articles of Incorporation that the directors of the foundation were not required, actually required to turn over any money to any charities, that it was a matter left entirely to their discretion. You understood that?

A. I understood it to this end only, that we had the position of directing that money, but I never did have any understanding that any of the money would not go to charities, but always that it would go there. There is no question in my mind or has there ever been. [66]

* * *

THOMAS H. KENT, JR.

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows: [70]

* * *

Direct Examination

By Mr. Webster. [71]

* * *

Q. I wonder if you will state briefly for us the reasons why you became associated with the foundation, as an incorporator, as an officer and as a member of the board of directors?

(Testimony of Thomas H. Kent, Jr.)

A. I was a Christian prior to my coming to Arizona. When I came here, I transferred my membership to the Capital Christian Church, where under the teaching of a very godly minister, I came to realize more fully God's purpose in my life. I became associated with Christian organizations outside of my own church. It was through meeting Christian men that I grew and also by working for the Eaton Fruit Company.

I was first told by Mr. Eaton of his vision.

Q. Mr. Ralph Eaton?

A. Ralph Eaton, of his vision to establish a foundation which would be able to further his Christian interests. Being interested in like things, I naturally thought it was swell, and I told him so. I told him I would be willing to help him in any way that I could to so establish it and to [73] further the purpose for which it was established.

* * *

Q. Are you aware of any activities of the foundation itself which were undertaken by the foundation and which you were not consulted upon?

A. I know of nothing. I definitely believe that I was consulted in confidence advance prior to any action which was ever taken and for which anything was ever done.

Q. Does that include the payment of interest to Mr. Eaton?

A. A CPA audited our books that year and [I] myself personally calculated the interest amount

(Testimony of Thomas H. Kent, Jr.)

due based on the actual [74] fund which we had that year.

Q. How about the payment of rent to Mr. Eaton by the foundation?

A. I personally drew the leases for that land. From experience with the farming industry and the general situations in Phoenix and as a land owner from my prior association with Eaton Fruit Company, I knew and felt the amounts were [75] proper.

* * *

Q. Now, Mr. Kent, just before you took the stand, [76] you heard his honor address certain questions to me, specifically related to the amounts that were given by the foundation to certain organizations in each of the tax years that were involved. We have stipulated that in the first period which went from March 12, 1947, to January 31, 1948, a total amount of $4240.00 was distributed in the manner indicated. For the fiscal year ending January 31, 1949, a total of $2310.00 was distributed in the manner indicated. I would like you to explain how it is that those amounts were arrived at and if necessary to consult such books and records as you might have brought with you in order to complete your answer.

A. Well, I will try to answer it satisfactorily without that. The amounts were not arrived at in any specific manner as certain appeals were made to us or certain occasions arose which were needful of contribution to the charities so named. We made

(Testimony of Thomas H. Kent, Jr.)

the contributions at the time. Now, as far as monies available are concerned, a sizeable amount of the income was towards the latter month—in other words, your fall crop of lettuce which isn't harvested until December and early January, and the actual profits accrued from that crop are not determined until actually at the end of the accounting year, so it was not practical to distribute any funds from that, or to even know that you had made money. Another factor involved in the apparent high income was that in our setup of accounting on the books, all the expenses [77] pertaining to the cost of development of the subdivision were charged as expenses and only that portion of payment, which in many cases might have only been a twenty-five or fifty-dollar down payment, were taken as income instead of the sale price with a balance of a contract as accounts receivable, therefore, the cash was not actually available to us even though you have that profit on the books. That partially answers your question.

Q. Now, would you elaborate on the cash position of the foundation during the two years that are involved here with respect to the amounts that were given to organizations eligible for foundation funds?

A. During the year 1947, ending in January 31, 1948, I believe that the highest bank balance during the period was about $12,000.00. The lowest was less than a thousand. Due to business operations, it so happens that at the end of the year because of the fall lettuce sales coming in, the bank account was a little over $30,000.00. By May of that following

(Testimony of Thomas H. Kent, Jr.)

year, which is 1948, ending the second year, the balance was again less than a thousand dollars. The operation of the construction business which we took over on January 1, 1948, right at the end of the first period, required the additional cash that was made available in the first period to operate and take it over.

Q. Mr. Kent, are you familiar with any standards, [78] that might have been used by the board of directors of the foundation in determining the exact amount of money or the actual amount of money that was distributed during the course of a year to the objects of the foundation?

A. During the period of 1947, during the first accounting period, I know of nothing. We just gave as the money was available and as the need was there. Coming into 1948, after taking over the construction company, we did not have too many funds available. It was sort of a scratch affair. Contract payments do not always come in as fast as you expect. There was not the money available. We didn't have any schedule and actually don't have now any set rule of how much we are going to give in any one calendar period. Is that what you meant?

Q. Yes.

A. There are no rules to go by. Our rules are based as the need arises and when we have the opportunity to make the investment like that to a charitable organization. We are approached by need. We see what we can do about it, and then make the

(Testimony of Thomas H. Kent, Jr.)
gift accordingly and the amounts in accordance with it.

Q. Now, Mr. Kent, I should appreciate a statement from you if you are able to make one, with respect to your understanding as an officer and a member of the board of directors of the foundation, as to what happens or what would [79] have happened if the assets and property of the foundation had been dissolved in any of the tax periods that are involved here.

A. It has always been my understanding that in case of dissolvment—we never considered that—that some day if the assets were dissolved, they would be given away to the beneficiaries of charitable contributions. We never had any intentions or thoughts of dissolving it, but the only case that has ever come up which would be the conversation between me and an employee of the auditing firm, just conversation.

"What are you going to do?"

"Just liquidate it and give it all away."

That is just conversation. We always intended that. However, there is no intention of dissolving it that I know of. We never contemplated that. [80]

* * *

Q. If the matter were presented to you for a vote, as a member of the board of directors of the Petitioner, as to the question of whether the assets or property of the foundation would be distributed definitely to charities, what would your vote be?

A. My vote would be that the cash be distributed

(Testimony of Thomas H. Kent, Jr.)
and the assets liquidated, the cash obtained to be distributed to charities as had been approved prior to that time by the board of directors. [81]

* * *

The Court: If you came to a point at which there was a conflict of interest, in which by taking a certain action the Petitioner foundation benefited on the one hand and by taking a different action Mr. Eaton would benefit on the other, which way would you cast your vote as a director?

The Witness: I believe that I would vote as my duty requires me both before God and as the director of the foundation, that I would vote to the interest of the foundation and to the purposes for which it has been established. [87]

* * *

Redirect Examination

By Mr. Webster:

Q. Mr. Kent, do you know whether the pendency of this case has had anything whatever to do with the amounts that have been distributed by the foundation to designated beneficiaries over the periods from May, 1949, to date?

A. It is only natural since the Treasury Department has refused to accept our status that it will be necessary to keep a reserve of cash. However, we haven't done it but we would like to, but upon the

(Testimony of Thomas H. Kent, Jr.)

recommendations of our attorneys in succeeding years, we should not be too careless in giving away everything we have had.

* * *

Filed June 15, 1952, T.C.U.S. [96]

The Tax Court of the United States

Docket No. 30,985

MEMORANDUM FINDINGS OF FACT AND OPINION

Opper, Judge:

Respondent determined deficiencies in petitioner's income tax liability and imposed delinquent filing penalties as follows:

Tax Period	Deficiency	Penalty
3/12/47 to 1/31/48	$23,263.05	(25%) $5,815.76
2/ 1/48 to 1/31/49	1,223.88	(10%) 122.39

The questions presented are whether petitioner was an exempt charitable corporation within the meaning of section 101(6), Internal Revenue Code,

and whether petitioner had reasonable cause for failing to file timely income tax returns.

Findings of Fact

Some of the facts have been stipulated and are found accordingly.

Petitioner is a corporation organized under the laws of Arizona in March, 1947. Its income tax returns for the periods in controversy were filed with the collector for the district of Arizona.

Petitioner's incorporators were Ralph H. Eaton, Frances M. Eaton, his wife, and Thomas H. Kent, Jr. They were elected directors of petitioner and also president, vice president and secretary-treasurer, respectively, which positions they still held in May, 1952. Petitioner has no capital stock outstanding and no subscriptions thereto. The Articles of Incorporation expressly prohibit the issuance of capital stock.

Petitioner's Articles of Incorporation describe the nature and purpose of its proposed business as

> To foster and promote Christian, religious, charitable and educational enterprises.
>
> * * *
>
> This corporation * * * does not contemplate pecuniary gain or profit to the members thereof * * *

The Articles also set forth a doctrinal statement describing the foundation upon which this corporation is based, as follows:

Article IV.

The foundation upon which this corporation is based is a heart-conviction of the truth of the following Doctrinal Statement:

1. We believe that the entire Bible is the inspired and inerrant word of God, the only infallible rule of faith and practice.

2. We believe that the Lord Jesus Christ is the only begotten Son of God, conceived by the Holy Spirit and born of the Virgin Mary.

3. We believe in the literal, bodily, physical and premillennial return of Jesus Christ.

4. We believe in the sacrificial and vicarious death of the Lord Jesus Christ on the cross and that He thereby made perfect substitutionary atonement for the sin of the world.

5. We believe that all men are sinners and in an eternally lost condition apart from the saving grace of the Lord Jesus Christ.

6. We believe that acceptance into the family of God and eternal salvation can only be secured by believing in and by faith accepting and receiving the Lord Jesus Christ as personal Sin-bearer, Lord and Saviour.

They direct that each director must reaffirm the doctrinal statement annually, in writing, and that the reaffirmance be filed with petitioner's permanent records. Failure, refusal or neglect to comply with this directive automatically divests the director of his office. The three directors did in fact reaffirm the doctrinal statement during the periods in controversy.

Ralph H. Eaton joined the Capital Christian Church of Phoenix, Arizona, in 1931. He became a member of the official board of the Church in about 1933. He is a life member of Gideons International. He is a director of the Arizona Bible Institute and the Phoenix Central High School, a member of the Layman's Advisory Council of the National Association of Evangelicals, and on the advisory boards of Christ for America, the American Soul Clinic and Bob Jones University of Greensville, South Carolina. In 1944, while attending an international convention of the Christian Business Men's Committee in New York City, Eaton heard a speech by an industrialist who had contributed money to charities and Christian work through his own charitable foundation. Thereafter, he read a book by the same individual which further described the part played by religion in his business pursuits.

Eaton's principal source of income was the Eaton Fruit Company, a business owned by him and his two brothers.

Kent had graduated from Butler University, and came to Phoenix in 1939. He went to work for the Eaton Fruit Company in 1941, and joined the Eaton-Heiskell Construction Company in 1945 as bookkeeper. In January, 1948, he became a salaried employee of petitioner. His duties were to act as office manager, bookkeeper and business manager, and to keep petitioner's minute book. Mr. and Mrs. Eaton had known Kent since about 1937. They had

been members of the same church and of many religious and charitable organizations. Kent was not related to the Eatons. For about two years prior to March, 1947, Kent and the Eatons discussed the formation of petitioner. Mrs. Eaton's interest in Christian work has always coincided with that of her husband.

In or about February, 1947, the Eatons and Kent consulted with Robert Weaver, a duly licensed attorney of Phoenix, Arizona, for the purpose of organizing petitioner. All details of the Articles of Incorporation except Article IV, the doctrinal statement, were left to Weaver for formulation. Article IV had been the subject of numerous deliberations among the incorporators for some time.

In March, 1947, Mr. and Mrs. Eaton transferred to petitioner, certain farm and office equipment in order to enable petitioner to engage in farming business operations. This equipment had been purchased within the previous six months at a total cost of $1,843.66. The Eatons further transferred to petitioner at about that time all their right, title and interest in and to certain growing crops against which they had advanced to the date of transfer a sum of $3,520.79. Petitioner agreed to pay that sum to the Eatons. In the spring of 1945, Eaton purchased 110 acres of land on West McDowell Road in Phoenix, Arizona, and transferred that land to a corporate trustee pursuant to two trust agreements. This land was subdivided into lots, and one-tenth interest was sold to one George Heiskell at that time. In April, 1947, the Eatons

transferred to petitioner their remaining nine-tenths interest in the trusts, which was accepted by petitioner's board of directors on April 1, 1947. The net cost of the interest turned over by the Eatons to petitioner was $27,410.62. On January 1, 1948, Eaton further transferred to petitioner his partnership interest in Eaton & Heiskell Construction Company, a business engaged primarily in contracting the construction of small residences, which was accepted by petitioner's directors at a meeting held January 1, 1948. The total cost to the Eatons of transfers to petitioner during its first fiscal year aggregated approximately $50,000.

During the periods in controversy, petitioner was engaged in four different businesses: Farming, selling real estate, constructing small residences, and selling sport clothes.

Petitioner's farming operations were conducted on land held under five leases. Under a lease dated March 20, 1947, petitioner leased from Eaton 80 acres of land known as the L Avenue Ranch for one year beginning February 1, 1947, at a rental of $40 per acre per year. This lease was renewed for another year at its expiration at the same rental. The original rental and the renewal were authorized by petitioner's directors. Petitioner further leased land known as the Swant Ranch from E. H. Swant for one year beginning July 1, 1947, at a rental of $30 per acre per year. On or about July 1, 1948, Eaton purchased the Swant Ranch and entered into a new lease between himself and petitioner for one year beginning July 1,

1948, at a rental of $40 per acre per year. On or about April 1, 1948, Eaton purchased 40 acres of farm land on Ramona Road, Phoenix, Arizona, and leased 35 acres thereof to petitioner for a period of one year beginning April 1, 1948, at a rental of $40 per acre per year. Petitioner also leased from one Lovell T. Rousseau a ranch known as the Rousseau Ranch for a term of approximately six months beginning July 1, 1948, and at a rental of $60 per acre per year. Petitioner leased a certain ranch known as the Mann Ranch from T. A. Mann for a term of one year beginning August 1, 1947, at a rental of $35 per acre per year. This lease was renewed at its expiration for an additional six months, at a rental rate of $45 per acre per year. All of these leases and their renewals were authorized by petitioner's board of directors.

Petitioner's farming operations were managed by one L. E. Eastes pursuant to a contract entered into with petitioner for one year beginning February 1, 1947, and subsequently extended for another year. Eastes is not related in any way to the Eatons or Kent, nor does he own any legal or beneficial interest in petitioner. Neither Mann, Swant nor Rousseau are related to Kent or the Eatons, nor do they have any interest in petitioner.

Petitioner's net income from its farming operations during the periods in controversy was as follows:

3/12/47 to 1/31/48	$16,731.14
2/ 1/48 to 1/31/49	7,095.23

The L Avenue Ranch was formerly leased by Eaton to the Eaton Fruit Company at the same rental later paid by petitioner.

Eaton charged petitioner for the rental of his lands because of financial necessity. He had purchased the Swant Ranch and Ramona land on an installment basis, and his combined payments per year, including amortization of principal on these properties were more than three times the rental he received from petitioner. He also expended substantial sums in improving these properties.

Petitioner's subdivision operations consisted of selling the subdivided lots contained in the land which had been subjected to trust agreements. Petitioner's net income from these operations for the periods in controversy was as follows:

3/1/47 to 1/31/48	$49,089.41
2/1/48 to 1/31/49	2,784.06

In or about November, 1945, Eaton entered into a partnership with George M. Heiskell under the name of Eaton & Heiskell Construction Company, to engage in general contracting. In January, 1948, petitioner purchased Heiskell's interest in the company for its book value. Simultaneously Eaton donated his interest in the company to petitioner. Petitioner has operated the business under its original name since that time. Heiskell was employed to manage the business for petitioner under a written contract, the terms of which provided for one year of employment beginning January 1, 1948. The term was extended in fact for an additional month, to January 31, 1949. Heiskell is not related

to the Eatons or to Kent. Petitioner derived the following net income from its construction operations during the periods in controversy:

3/12/47 to 1/31/48 ..... (none)
2/1/48 to 1/31/49 .....$7,551.52

On June 2, 1947, pursuant to authorization of its directors, petitioner acquired the distributorship within the State of Arizona of certain sport clothes manufactured by one C. F. Smith. Petitioner operated this business under the name of "Hollywood Sportogs of Arizona," and was to receive 10 per cent of all gross sales. This business activity was discontinued on June 1, 1948, due to management difficulties and lack of sales. Petitioner incurred net losses from this business during the periods in controversy as follows:

3/12/47 to 1/31/48 .....($533.83)
2/ 1/48 to 1/31/49 .....(134.39)

Petitioner's directors discussed its business activities fully before undertaking each of them, and were completely agreed on petitioner's course of action in all cases.

At a meeting of the directors on May 1, 1947, petitioner adopted a list of 26 named beneficiaries engaged in charitable or religious work to whom its funds would be made available, in its discretion. It also provided for contributions of not more than $10 by petitioner's president to miscellaneous organizations engaged in charitable and religious work, without necessity for consulting the Board. At a Board meeting held on January 1, 1949, seven

additional named beneficiaries were added to petitioner's list. This list was compiled after a thorough investigation of the activities of each organization. Petitioner kept a file on each. All beneficiaries had to be and are engaged in activities which carried out the purposes and ideas for which petitioner was established. None of them is engaged in the carrying on of propaganda or in efforts to influence legislation. None of them has any private, beneficial or personal interest in petitioner. No beneficiaries are individuals; any names of individuals on petitioner's list appear as representatives of an organization. During the periods in controversy, petitioner made contributions to beneficiaries as follows:

3/12/47 to 1/31/48	$4,240
2/ 1/48 to 1/31/49	2,310

In addition to monetary contributions, petitioner rendered consultative services to some beneficiaries. Petitioner's officers assisted in planning two church building programs.

Except for rental payments, interest on money borrowed, payment for costs advanced by Eaton on certain equipment and growing crops, and repayment of loans, petitioner paid nothing of tangible value to Eaton or to his family during the instant taxable years. Eaton rendered substantial services to petitioner. The only compensation received by Kent is a weekly salary of $100, paid since January 1, 1948, when he began devoting his full time to petitioner's affairs. He has rendered substantial services to petitioner.

Petitioner relied for its tax information on a firm of certified public accountants and tax consultants which enjoyed an excellent reputation in the field of income taxation among prominent business men in the Phoenix community. The Phoenix manager of this firm advised petitioner that it was an exempt corporation and did not have to file Federal income tax returns. Petitioner filed an application for exemption signed by Ralph H. Eaton, president, under section 101(6) of the Internal Revenue Code on or about June 14, 1948, on the advice of these tax consultants.

On April 8, 1949, petitioner was advised that its claim for exemption had been denied. On May 9, 1949, petitioner filed a protest to the Commissioner's finding. Upon learning that petitioner's exemption claim had been rejected, petitioner's tax consultants advised it to file Federal income tax returns for the periods in controversy, which petitioner did on May 13, 1949. Petitioner's failure to file timely Federal tax returns for the periods in controversy was due to reasonable cause and not to willful neglect.

OPINION

The claim of petitioner, a corporation conducting exclusively business operations, for exemption under section 101(6), Internal Revenue Code,[1] as a

[1] "Sec. 101. Exemptions From Tax on Corporations.

"The following organizations shall be exempt from taxation under this chapter—

"(6) Corporations, and any community

"feeder" corporation of unmistakably exempt religious organizations must be rejected because "The Tax Court has * * * indicated that it had not changed its thinking on this point despite a reversal by the Court of Appeals for the Third Circuit * * *. Cf. C. F. Mueller Co., 14 T. C. 922, revd. 190 F. 2d 120 * * *." John Danz, 18 T. C. 454, 461. On this point petitioner candidly concedes that after the Mueller decision " * * * the Tax Court has consistently held in line with the Mueller decision, despite the reversal of the latter by the 3rd Circuit." It also correctly analyzes the conflict among the various Circuits on this point,[2] resolution of which by the Supreme Court, whether or not likely in view of the modification of section

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chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;"

---

[2]Again quoting from petitioner's brief:

"To attempt to reconcile the viewpoint of the majority of courts that destination controls over source with the current viewpoint of the Tax Court and the two 'dissenting' circuits (the 4th and the 7th) would seem to be an impossible task."

101(6) contained in the Revenue Act of 1950,[3] has not yet taken place.

The only discussion in the Court of Appeals for the Ninth Circuit to which we have been referred, Squire vs. Students Book Corp., 191 F. 2d 1018, is actually noncommittal on the present facts, as witnessed by the following language in that opinion:

> Resolution of the case before us does not depend wholly on the ultimate destination of the taxpayer's profits. The business enterprise in which taxpayer is engaged obviously bears a close and intimate relationship to the functioning of the College itself. In some of the cases adhering to the general rule no similar relationship is discernible. In the Mueller case, supra, for example, * * * the taxpayer was a mere macaroni manufacturing plant in competition with other such plants.
>
> See Trinidad vs. Sagrada Orden de Predicadores, 263 U. S. 578.

We accordingly pass other difficult questions lurking in the present record, such as the fact that petitioner operated property rented to it by its founder and guide, Ralph Eaton, who with his wife constituted two-thirds of petitioner's board of directors; its failure to distribute more than a small fraction of its own operating income even to the

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[3]Revenue Act of 1950, section 331.

beneficiary religious organizations;[4] and to borrow the language of petitioner's brief: " * * * the admitted absence of an express prohibition in the Articles against the return of assets to petitioner's founders on dissolution." See Norton, et al., vs. Steinfeld, et al. (Ariz.), 288, pp. 3, 6; 16 Fletcher on "Corporations," 878. Whether under such circumstances petitioner could in any event qualify as an organization operated "exclusively" for religious purposes "no part of the net earnings of which inures to the benefit of any private shareholder or individual" we need not now decide. For the reason stated, the deficiency in this respect is approved.

As to the penalty issue, the doubtful state of the law clearly justified petitioner's resort to qualified tax counsel. It was upon his advice that an application for exemption rather than a tax return was filed. We think under the circumstances there has been a showing of reasonable cause rather than willful neglect. See William H. Gross, 7 T. C. 837, 848.

Decision will be entered under Rule 50.

---

[4]

Year	Total Adjusted Operating Income	Contributions Actually Made	Contributions Allowed as Deductions (5% of Net Income)
3/12/47 to 1/31/48	$65,510.49	$4,240.00	$3,222.03
2/ 1/48 to 1/31/49	17,633.92	2,310.00	302.95

Entered February 27, 1953.

Received February 20, 1953.

Served March 2, 1953.

The Tax Court of the United States

Docket No. 30,985

RALPH H. EATON FOUNDATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Respondent having on May 4, 1953, filed a recomputation of tax for entry of decision as in accordance with Memorandum Findings of Fact and Opinion of the Court, entered February 27, 1953, and this proceeding having been called from the Washington, D. C., calendar on June 3, 1953, at which time there was no appearance for the petitioner, and the recomputation of the respondent was not contested, now therefore, it is

Ordered and Decided: That there are deficiencies in income tax and no penalties for the years and in the amounts as follows:

March 12, 1947, to January 31, 1948. .$23,263.05

Year ended January 31, 1949 ..... 1,223.88

/s/ CLARENCE V. OPPER,
Judge.

Served June 8, 1953.

Entered June 8, 1953.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 21, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the Designation of Contents of Record on Review (except exhibits 1-A through 7-G, attached to stipulation of facts, and petitioner's exhibits 8 and 9, admitted in evidence, which are separately certified and forwarded herewith) on file in my office as the original and complete record in the proceeding before the Tax Court of The United States entitled: "Ralph H. Eaton Foundation, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 30,985," and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 11th day of September, 1953.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States.

[Endorsed]: No. 14,047. United States Court of Appeals for the Ninth Circuit. Ralph H. Eaton Foundation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed September 21, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 30,985

RALPH H. EATON FOUNDATION,
Petitioner and Appellant,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

STATEMENT OF POINTS

Ralph H. Eaton Foundation, the petitioner herein, by Martin H. Webster, its attorney, hereby asserts the following errors, which it intends to urge on review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States rendered in the above cause on June 8, 1953:

(1) The Tax Court erred in finding that the petitioner was not an exempt corporation under Section 101(6) of the Internal Revenue Code for the periods from March 12, 1947, to January 31, 1948, and for the fiscal year ended January 31, 1949.

(2) The Tax Court erred in failing to find that the petitioner was organized exclusively for religious, charitable or educational purposes.

(3) The Tax Court erred in failing to find that the petitioner was operated exclusively for religious, charitable and educational purposes.

(4) The Tax Court erred in failing to find that, for the period from March 12, 1947, to January 31, 1948, and for the fiscal year ended January 31, 1949, no part of the net earnings of the petitioner inured to the benefit of any private shareholder or individual.

(5) The Tax Court erred in failing to find that no substantial part of the activities of the petitioner was, during the period from March 12, 1947, to January 31, 1948, and for the fiscal year ended January 31, 1949, the carrying on of propaganda or otherwise attempting to influence legislation.

(6) The Tax Court erred in failing to find as a fact each and all of the statements contained in paragraphs 12(a), 13(a), 14(c), 16 and 20 of the Stipulation executed by counsel for both parties hereto on May 20, 1952, and duly received in evidence as a part of the proceedings before the Tax Court in this matter.

(7) The Tax Court erred in entering its decision wherein it ordered and decided that there is a deficiency of $23,263.05 due from the petitioner for the period from March 12, 1947, to January 31, 1948, and a deficiency of $1,223.88 for the fiscal year ended January 31, 1949.

/s/ MARTIN H. WEBSTER,
Counsel for Petitioner.

Affidavit of mailing attached.

[Endorsed]: Filed September 30, 1953.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between Ralph H. Eaton Corporation, petitioner on review, and the Commissioner of Internal Revenue, respondent, by their respective counsel, that all exhibits introduced into evidence in this proceeding, being exhibit numbers 1-A through 7-G (attached to the stipulation introduced into evidence) and exhibit numbers 8 and 9, may, subject to the approval of the Court, be not printed but that they be transmitted to the Court in their original form and be referred to in all briefs and the oral argument to the same extent as though they were part of the printed record.

/s/ MARTIN H. WEBSTER,
Counsel for the Petitioner.

/s/ H. BRIAN HOLLAND,
Assistant Attorney General,
Counsel for the Respondent.

[Endorsed]: Filed November 19, 1953.

No. 14,047.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH H. EATON FOUNDATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of Decision of the Tax Court of the United States.

BRIEF FOR THE PETITIONER.

MARTIN H. WEBSTER,
215 West Seventh Street,
Los Angeles 14, California,
Attorney for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 14,047.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH H. EATON FOUNDATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of Decision of the Tax Court of the United States.

BRIEF FOR THE PETITIONER.

This case involves the question as to whether a corporation is liable for income taxes or whether it is exempt therefrom.

Opinion Below.

The opinion of the Tax Court of the United States is found at R. 28, and is reported at C. C. H. Memo. T. C., Par. 19490(M).

Jurisdiction.

The jurisdiction of the Tax Court was based on Internal Revenue Code Section 272. The decision of that Court was entered on June 8, 1953.

The jurisdiction of this Court is based on Internal Revenue Code Sections 1141 and 1142. Petition for Review by this Court was filed in the Tax Court on August 17, 1953. Venue in this Court is established by Internal Revenue Code Section 1141(b), and the fact that the returns of the tax in respect of which the alleged liability arises were filed with the Collector of Internal Revenue at Phoenix, Arizona, within this Circuit.

Statute Involved.

The statute involved is Internal Revenue Code Section 101(6) which, during the tax years involved herein, read as follows:

> "The following organizations shall be exempt from taxation under this chapter—
>
> "(6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;" * * *

Question Presented.

Is a corporation exempt from income tax under Internal Revenue Code Section 101(6) where, although it operated businesses for profit, its purpose and intention in so doing, as expressed by its Articles of Incorporation and by the individuals who founded the corporation and comprised its Board of Directors, was to devote that profit to charitable and religious ends?

Statement.

Petitioner is in accord with all of the facts found by the Tax Court [R. 29 to 38]. However, there are additional facts which petitioner contends the Tax Court was entitled but failed specifically to find. The statement which follows will summarize the facts as specifically found by the Tax Court and will supplement the same with concise statements of additional uncontroverted facts which are relevant to this appeal. Such additional facts will be supported by references to pages of the Transcript of Record forming a part of the record on appeal in this matter.

Ralph H. Eaton joined the Capital Christian Church of Phoenix, Arizona, in 1931, and became a member of the official board of the Church in about 1933. He is a life member of Gideons International. He is a director of the Arizona Bible Institute and the Phoenix Central High School, a member of the Layman's Advisory Council of the National Association of Evangelicals, and on the advisory boards of Christ for America, the American Soul Clinic and Bob Jones University of Greensville, South Carolina. In 1944, while attending an international convention of the Christian Business Men's Committee in New York City, Eaton heard a speech by an industrialist who had contributed money to charities and Christian work through his own charitable foundation. Thereafter, he read a book by the same individual which further described the part played by religion in his business pursuits.

Mr. Eaton thereupon discussed with his wife the matter of forming a foundation of his own. Mrs. Eaton was definitely interested [R. 7] since Mrs. Eaton's interest in Christian work has always coincided with that of her husband.

Mr. and Mrs. Eaton had known Thomas H. Kent, Jr., since about 1937, having been members of the same Church and many religious and charitable organizations together. Mr. Kent was not related to the Eatons. He had graduated from Butler University and had come to Phoenix in 1939. He went to work for the Eaton Fruit Company in 1941 and joined the Eaton-Heiskell Construction Company in 1945 as a bookkeeper.

For about two years prior to March, 1947, Mr. Kent and the Eatons had discussed the formation of a charitable foundation. In these discussions Mr. and Mrs. Eaton took into account the fact that their family lived on a moderate income and that their interest above that was "to give to the Lord's work" [R. 8]. Mr. Eaton's principal source of income was the Eaton Fruit Company, a business owned by him and his two brothers. It provided an income that was sufficient for Mr. Eaton and his family [R. 8].

In or about February, 1947, the Eatons and Kent consulted with Robert Weaver, a duly licensed attorney, of Phoenix, Arizona, for the purpose of organizing petitioner. All details of the Articles of Incorporation except Article IV (quoted below) were left to Weaver for formulation.

In March, 1947, the petitioner corporation was organized under the laws of the State of Arizona.

Petitioner's incorporators were Mr. and Mrs. Eaton and Kent. They were elected directors of petitioner and also president, vice president and secretary-treasurer, respectively, which positions they still held in May, 1952. Petitioner has no capital stock outstanding and no subscriptions thereto. The Articles of Incorporation expressly prohibit the issuance of capital stock.

Petitioner's Articles of Incorporation describe the nature and purpose of its proposed business as

> "To foster and promote Christian, religious, charitable and educational enterprises."
>
> * * * * * * * *
>
> "This corporation * * * does not contemplate pecuniary gain or profit to the members thereof. * * *"

The Articles also set forth in Article IV a doctrinal statement describing the foundation upon which this corporation is based. Article IV had been the subject of numerous deliberations among the Eatons and Kent for some time, and read as follows:

> "Article IV.
>
> "The foundation upon which this corporation is based is a heart-conviction of the truth of the following Doctrinal Statement:
>
> "1. We believe that the entire Bible is the inspired and inerrant word of God, the only infallible rule of faith and practice.
>
> "2. We believe that the Lord Jesus Christ is the only begotten Son of God, conceived by the Holy Spirit and born of the Virgin Mary.
>
> "3. We believe in the literal, bodily, physical and premillennial return of Jesus Christ.
>
> "4. We believe in the sacrificial and vicarious death of the Lord Jesus Christ on the cross and that He thereby made perfect substitutionary atonement for the sin of the world.
>
> "5. We believe that all men are sinners and in an eternally lost condition apart from the saving grace of the Lord Jesus Christ.
>
> "6. We believe that acceptance into the family of God and eternal salvation can only be secured by

believing in and by faith accepting and receiving the Lord Jesus Christ as personal Sin-bearer, Lord and Saviour."

Petitioner's Articles direct that each director must reaffirm the doctrinal statement annually, in writing, and that the reaffirmance be filed with petitioner's permanent records. Failure, refusal or neglect to comply with this directive automatically divests the director of his office. The three directors did in fact reaffirm the doctrinal statement during the periods in controversy.

Mr. Eaton's purpose in causing the formation of petitioner was to foster and promote Christian, religious, evangelistic, missionary endeavors and enterprises, and Mrs. Eaton's purpose coincided therewith [R. 7]. Kent, being also interested in Christian work, desired to help the Eatons to establish petitioner and to further the purpose for which it was established [R. 21, 22].

The Eatons and Kent, at the time of the formation of petitioner, discussed the fact that, for petitioner to fulfill the purposes for which it was founded, it would have to receive gifts and would have to enter into various "phases of business that would produce income for the purpose of giving it to these Christian organizations that we had an interest in and a desire to help" [R. 9].

Accordingly, during the periods in controversy, petitioner was engaged in four different businesses: Farming, selling real estate, constructing small residences, and selling sport clothes. Petitioner's directors discussed its business activities fully before undertaking each of them, and were completely agreed on petitioner's course of action in all cases.

To enable petitioner to engage in these businesses, Mr. and Mrs. Eaton transferred certain properties to petitioner. Thus, to enable petitioner to engage in farming, Mr. and Mrs. Eaton in March, 1947, transferred to petitioner certain farm and office equipment which had been purchased by them within the previous six months at a total cost of $1,843.66. The Eatons also transferred to petitioner their right, title and interest in certain growing crops against which they had advanced the sum of $3,520.79, which sum petitioner agreed to repay to the Eatons.

To enable petitioner to engage in the business of selling real estate, the Eatons in April, 1947, transferred their interest in certain trusts to petitioner. These trusts owned 110 acres of subdivided land on West McDowell Road in Phoenix, Arizona, and the Eatons owned a 9/10ths interest in these trusts. The net cost of the interest turned over by the Eatons to petitioner was $27,410.62.

To enable petitioner to engage in the construction business, Mr. Eaton transferred to petitioner, on January 1, 1948, his partnership interest in Eaton & Heiskell Construction Company, a business engaged primarily in contracting the construction of small residences. The Eaton & Heiskell Construction Company had commenced business in 1945 when Eaton entered into a partnership with George M. Heiskell. In January, 1948, petitioner purchased Heiskell's interest in the Company for its book value and it was at that time that Eaton transferred his interest in the Company to petitioner as aforesaid.

The total cost to the Eatons of the transfers to petitioner of the farm and office equipment, the trust inter-

ests, and the partnership interest in Eaton & Heiskell Construction Company aggregated approximately $50,000.00.

All of the transfers above described were given to petitioner without consideration, and said gifts were duly accepted by the Board of Directors of petitioner on the day when said gifts were made [R. 3, 4 and 5 (Stip. Par. 12(a), 13(a), 14(c))].

Petitioner's farming operations were conducted on land held under five leases. Under a lease dated March 20, 1947, petitioner leased from Eaton 80 acres of land known as the L Avenue Ranch for one year beginning February 1, 1947, at a rental of $40.00 per acre per year. This lease was renewed for another year at its expiration at the same rental. The original rental and the renewal were authorized by petitioner's directors. The L Avenue Ranch was formerly leased by Eaton to the Eaton Fruit Company at the same rental later paid by petitioner. Petitioner further leased land known as the Swant Ranch from E. H. Swant for one year beginning July 1, 1947, at a rental of $30.00 per acre per year. On or about July 1, 1948, Eaton purchased the Swant Ranch and entered into a new lease between himself and petitioner for one year beginning July 1, 1948, at a rental of $40.00 per acre per year. On or about April 1, 1948, Eaton purchased 40 acres of farm land on Ramona Road, Phoenix, Arizona, and leased 35 acres thereof to petitioner for a period of one year beginning April 1, 1948, at a rental of $40.00 per acre per year. Petitioner also leased from one Lovell T. Rousseau a ranch known as the Rousseau Ranch for a term of approximately six months beginning July 1, 1948, and at a rental of $60.00 per acre per year. Petitioner leased a certain ranch known as the Mann

Ranch from T. A. Mann for a term of one year beginning August 1, 1947, at a rental of $35.00 per acre per year. This lease was renewed at its expiration for an additional six months, at a rental rate of $45.00 per acre per year. All of these leases and their renewals were authorized by petitioner's board of directors.

Petitioner's farming operations were managed by one L. E. Eastes pursuant to a contract entered into with petitioner for one year beginning February 1, 1947, and subsequently extended for another year. Eastes is not related in any way to the Eatons or Kent, nor does he own any legal or beneficial interest in petitioner.

Petitioner's net income from its farming operations during the periods in controversy was as follows:

3/12/47 to 1/31/48	$16,731.14
2/1/48 to 1/31/49	7,095.23

Eaton charged petitioner for the rental of his lands because of financial necessity. He had purchased the Swant Ranch and Ramona land on an installment basis, and his combined payments per year, including amortization of principal on these properties were more than three times the rental he received from petitioner. He also expended substantial sums in improving these properties.

The rentals which were charged by Eaton were determined on the basis of, and never exceeded, the average rental in the area for comparable property, taking into account the improvements, location, fertility of the soil, water availability and land value [R. 10 to 15]. Kent knew all rents charged petitioner by Eaton were proper [R. 23].

Petitioner's subdivision operations consisted of selling the subdivided lots contained in the land which had been

subject to the trust agreements. Petitioner's net income from these operations for the periods in controversy was as follows:

3/1/47 to 1/31/48	$49,089.41
2/1/48 to 1/31/49	2,784.06

Petitioner's construction operations commenced on January 1, 1948, when it purchased George M. Heiskell's interest and received a gift of Mr. Eaton's interest in the partnership known as Eaton & Heiskell Construction Company. Petitioner has operated the business under its original name since that time. Heiskell was employed to manage the business for petitioner under a written contract, the terms of which provided for one year of employment beginning January 1, 1948. The term was extended in fact for an additional month, to January 31, 1949. Heiskell is not related to the Eatons or to Kent. Petitioner derived the following net income from its construction operations during the periods in controversy:

3/12/47 to 1/31/48	(none)
2/1/48 to 1/31/49	$7,551.52

On June 2, 1947, pursuant to authorization of its directors, petitioner acquired the distributorship within the State of Arizona of certain sport clothes manufactured by one C. F. Smith. Petitioner operated this business under the name of "Hollywood Sportogs of Arizona," and was to receive 10 per cent of all gross sales. This business activity was discontinued on June 1, 1948, due to management difficulties and lack of sales. Petitioner incurred net losses from this business during the periods in controversy as follows:

3/12/47 to 1/31/48	($533.83)
2/1/48 to 1/31/49	(134.99)

In order to have money to operate, it was necessary for petitioner to borrow money from time to time from Mr. Eaton. Mr. Eaton, being short of funds, in turn borrowed the money at the bank in his own personal name and loaned it to petitioner. Since he had to pay interest to the bank, and since he could not afford making such payment without reimbursement, he requested petitioner to pay him, and petitioner did pay him, the amount of interest he had to pay to the bank [R. 15, 16]. The amount of interest due Mr. Eaton from petitioner was calculated by Kent [R. 22, 23].

Except for rental payments, interest on money borrowed, payments for costs advanced by Eaton on certain equipment and growing crops, and repayment of loans, petitioner paid nothing of tangible value to Eaton or to his family during the instant taxable years, despite the fact that Eaton had rendered substantial services to petitioner. Mrs. Eaton had also contributed a great amount of time and effort to the supervision of the activities of petitioner [R. 5 (Stip. Par. 16)].

In this connection the Eatons had made it plain from a time before petitioner was incorporated that there would never be any compensation to Mr. Eaton personally nor to his family, and neither Eaton nor his wife expect to receive at any time compensation for services rendered during the tax years in question [R. 16, 17].

In January, 1948, Kent became a salaried employee of petitioner. He has rendered substantial services to petitioner since that time, having acted as office manager, bookkeeper and business manager and having kept petitioner's minute book. The only compensation which Kent has received has been a weekly salary of $100.00 paid

him since January 1, 1948, when he began devoting his full time to petitioner's affairs.

During the tax years here involved petitioner has not engaged in carrying on propaganda or otherwise attempted to influence legislation [R. 17].

At a meeting of the directors on May 1, 1947, petitioner adopted a list of 26 named beneficiaries engaged in charitable or religious work to whom its funds would be made available, in its discretion. It also provided for contributions of not more than $10.00 by petitioner's president to miscellaneous organizations engaged in charitable and religious work, without necessity for consulting the Board. At a Board meeting held on January 1, 1949, seven additional named beneficiaries were added to petitioner's list. This list was compiled after a thorough investigation of the activities of each organization. Petitioner kept a file on each. All beneficiaries had to be and are engaged in activities which carried out the purposes and ideas for which petitioner was established. None of them is engaged in the carrying on of propaganda or in efforts to influence legislation. None of them has any private, beneficial or personal interest in petitioner. No beneficiaries are individuals; any names of individuals on petitioner's list appear as representatives of an organization. During the periods in controversy, petitioner made contributions to beneficiaries as follows:

3/12/47 to 1/31/48	$4,240.00
2/1/48 to 1/31/49	2,310.00

In addition to monetary contributions, petitioner rendered consultative services to some beneficiaries and petitioner's officers assisted in planning two church building programs.

The amounts contributed in the years in question were determined on the basis of the actual cash which petitioner

had available and the needs of the particular beneficiaries [R. 23-26]. There were times when petitioner's cash balance was less than $1,000.00 [R. 24, 25]; hence, petitioner did not have money available in order to make any larger contributions [R. 25]. Moreover, the pendency of the instant case made it advisable and necessary for petitioner, upon the recommendation of its attorneys, to keep some cash reserve in the event of an adverse decision [R. 27, 28].

There are no immediate plans for the dissolution of petitioner [R. 17, 26]. Should petitioner be dissolved, it was the understanding of Eaton and his family that none of the assets of petitioner would ever return to Eaton in any way [R. 17, 18]. The Eatons and Kent understood that the assets of petitioner were intended to go to the charities and Christian organizations approved by the Board of Directors of petitioner [R. 19, 26, 27].

On June 15, 1948, Eaton executed as president of petitioner an exemption affidavit. Question No. 16 thereof read as follows:

> "In the event of the dissolution of the organization, what disposition would be made of its property?"

The answer that was typed in was:

> "To be dispersed to charitable and religious organizations."

This represented Eaton's understanding of the situation at that time [R. 19, 20].

The Eatons relied upon their attorney to insure that there would never accrue to Eaton in any way, nor to his family, anything from the Foundation [R. 20, 21]. At the time of trial Eaton desired that, if petitioner's Articles

were inadequate to insure this result, they should be amended as quickly as possible [R. 19, 20].

Under this state of facts, the Tax Court rendered its decision on February 27, 1953, that petitioner was not exempt under Internal Revenue Code 101(6) and that there was owed from petitioner a deficiency of $23,263.05 for the period March 12, 1947, to January 31, 1948, and $1,223.88 for the fiscal year ended January 31, 1949.

The Commissioner had assessed a penalty for wilfull neglect in failing to file timely returns. The Tax Court found no wilfull neglect but rather reasonable cause and the penalty matter is therefore not in issue on this appeal.

Summary of Argument.

Petitioner was exempt from tax under Internal Revenue Code Section 101(6) even though it operated businesses for profit. It meets the four conditions laid down by that section: (1) petitioner was organized for one or more of the required statutory purposes; (2) petitioner did not engage in the carrying on of propaganda; (3) no part of the net earnings inured to the benefit of any private individual; and (4) petitioner was operated exclusively for one or more of the required statutory purposes.

Where the destination of an organization's income, though derived from business sources, was charitable and religious, many cases (before the 1950 Revenue Act) have decided that destination is more important than the source of the income in determining an exempt status. The legislative history of Internal Revenue Code Section 101(6) affirms the correctness of those decisions.

Petitioner's articles and the testimony of petitioner's founders make plain that the destination of petitioner's income was charitable and religious.

ARGUMENT.

Petitioner Meets All of the Conditions for Exemption Established by Internal Revenue Code Section 101(6).

Internal Revenue Code Section 101(6) lays down four conditions which must be met in order for an organization to be exempt in a particular taxable year. These conditions are:

(1) The organization must have been *organized* exclusively for one or more of the specified statutory purposes;

(2) No substantial part of its activities can consist of the carrying on of *propaganda* or otherwise attempting to influence legislation;

(3) No part of the *net earnings* of the organization inures to the benefit of any private individual; and

(4) The organization must be *operated* exclusively for one or more of the specified statutory purposes.

The Tax Court, in holding that petitioner was not exempt under Internal Revenue Code Section 101(6), did so because petitioner was engaged in business operations. While the Tax Court did not specifically indicate which of the four conditions above set forth it thus considered not to have been satisfied, it would appear analytically that its holding considers that the fourth, or operational, condition had been breached. Hence, it will be with that topic that the major portion of this brief will deal. It would be desirable, however, first to dispose of the remaining conditions which must be satisfied before considering the fourth and principal one.

A. Petitioner Was Organized for the Required Statutory Purposes.

There would appear to be no doubt, from any of the cases decided under Internal Revenue Code Section 101(6), that the "organized" test has been satisfied.

Some of the cases decided under that section state that the corporate charter is conclusive on whether the taxpayer was "organized" exclusively for the statutory purposes.

> See, *e. g., Cummins-Collins Foundation,* 15 T. C. 613 (1950).

Petitioner's corporate charter describes the nature and purpose of its proposed business as "To foster and promote Christian, religious, charitable and educational enterprises." The articles further provide, "This corporation * * * does not contemplate pecuniary gain or profit to the members thereof * * *" [R. 29]. If this specific language of petitioner's articles is to be accorded its natural legal significance, there is no conclusion possible other than that petitioner was "organized" exclusively for one or more of the required statutory purposes.

A majority of the cases on this point hold, however, that the term "organized" is not synonymous with "incorporated," and that evidence outside of the articles may be looked to in order to determine whether the taxpayer was organized for the required purposes.

> See, *e. g., Roche's Beach, Inc. v. Com'r,* 96 F. 2d 776 (C. A. 2d, 1938);
>
> *Goldsby King Memorial Hospital,* T. C. Docket 204, memo, op. 7/19/44;
>
> *Unity School of Christianity,* 4 B. T. A. 61 (1926).

(It may be noted that the cases which do look outside of the articles on this question involve taxpayers whose articles provided for purposes broader than those contemplated by the statute. That this is not true in the case of petitioner has already been discussed.)

An examination of the evidence available to this Court, outside of the articles themselves, shows that petitioner was organized in the required manner. Mr. Eaton's purpose in causing petitioner to be organized was "exactly as stated in the articles, foster and promote, Christian, religious, evangelical, missionary endeavors and enterprises" [R. 7]. Mrs. Eaton agreed with this purpose [R. 7]. And Kent, the third organizer of petitioner, being also interested in Christian work, desired to help the Eatons to establish petitioner and to further the purpose for which it was established [R. 21, 22].

That such evidence of intent and motive on the part of the founders is material to resolve the first, or organizational, test is apparent from the statutory use of the volitional word "purpose."

See, *e. g., Com'r v. Edward Orton, Jr., Ceramic Foundation,* 173 F. 2d 483 (C. A. 6th, 1949);

Cummins-Collins Foundation, supra.

B. Petitioner Did Not Carry on Propaganda.

It is assumed that no argument need be submitted on the proposition that petitioner did not engage in the carrying on of propaganda nor did it otherwise attempt to influence legislation. The record bears out that petitioner did not itself engage in such prohibited activities [R. 17]. Moreover, the Tax Court found that it did not support any organizations which were so engaged [R. 37].

C. No Part of Petitioner's Net Earnings Inures to a Shareholder or Individual.

It is to be noted that, while Internal Revenue Code Section 101(6) specifies that "net earnings" shall not inure to the benefit of private shareholders or individuals, the Regulations (Reg. 111, sec. 29.101(6)-1) have for a long time used the term "net income," and the Treasury Department may thus be considered as conceding that the two terms are synonymous. It requires no citation to authority to establish that the term "net income," in turn, means gross income less allowable deductions.

The most obvious instance of net earnings inuring to the benefit of a private shareholder or individual is the case where compensation is paid in an unreasonable amount to some person who has a private and personal interest in the organization's activities.

> *Mabee Petroleum Corporation v. Com'r,* 203 F. 2d 872 (C. A. 5th, 1953).

The Tax Court found, however, that Mr. and Mrs. Eaton rendered substantial services to petitioner but that, except for certain payments hereafter mentioned, petitioner paid nothing of tangible value to Eaton or to his family. Moreover, the Tax Court found that Kent rendered substantial services as a full time employee of petitioner for which he received a weekly salary of $100.00. While the Tax Court failed to make a finding as to whether this constituted unreasonable compensation, it is assumed that as a matter of law this Court could so hold (or that, if necessary, the case might be remanded for a specific finding on that subject).

The Tax Court further found that the Eatons sold to petitioner their interest in certain growing crops at a figure

equal to the amount which they had advanced against said crops. The record further shows that Eaton charged petitioner interest on money he lent to petitioner, but only in the amount which Eaton himself was called upon to pay to the bank from which he himself had borrowed [R. 15, 16]. Neither the payment for growing crops nor the payment of interest can seriously be contended to have been a distribution of petitioner's "net earnings" since they constituted legitimate deductions from gross income. Petitioner further assumes, without discussion, that the repayment of loans by petitioner to Eaton did not constitute a prohibited transaction.

There thus remains only the matter of rents paid by petitioner to the Eatons for the use of their farm lands which could by any possibility be considered as net earnings inuring to the benefit of a private shareholder or individual. Considerable testimony was adduced before the Tax Court on the reasonableness of the rent which Eaton charged petititoner. While the Tax Court made no specific findings on this subject, the evidence thereon was uncontradicted and has been reproduced as part of the Transcript of Record. This record shows that the rentals charged by Eaton were determined on the basis of, and never exceeded, the average rental in the area for comparable property, taking into account the improvements, location, fertility of the soil, water availability, and land value [R. 10-15]. Kent knew all rents charged petitioner by Eaton were proper [R. 23].

It is thus submitted that none of the "net earnings" or "net income" of petitioner inured to the benefit of any private shareholder or individual.

D. Petitioner Was Operated for the Required Statutory Purposes.

(1) The Case History of Internal Revenue Code Section 101(6) Shows That Destination Controls Over Source.

The Tax Court in the instant case relied upon the cases previously decided by that Court to support its position that the mere fact of business activity by petitioner was enough to destroy petitioner's claim to exemption, despite the charitable or religious destination of petitioner's income.

This point is one which has been profusely litigated and no purpose would appear to be served by an extensive review of the course of that litigation.

A majority of jurisdictions considering the question have held that the destination of the income is more significant than its source, and that the mere fact that an organization conducted a business activity was not sufficient to deprive it of an exempt status where all other requisite conditions are satisfied. The jurisdictions so holding and representative cases therefrom are:

United States Supreme Court: *Trinidad v. Sagrada Orden de-Predicadores,* 263 U. S. 578 (1924);

Second Circuit: *Roche's Beach, Inc. v. Com'r,* 96 F. 2d 776 (1938);

Third Circuit: *C. F. Mueller Co. v. Com'r,* 190 F. 2d 120 (1951);

Fifth Circuit: *Willingham v. Home Oil Mill,* 181 F. 2d 9 (1950);

Sixth Circuit: *Com'r v. Edward Orton, Jr., Ceramics Foundation,* 173 F. 2d 483 (1949);

Court of Claims: *Sico Co. v. United States,* 102 Fed. Supp. 197 (1952).

The Treasury Department itself has, at one time, concurred with this majority view.

S. M. 5516, C. B. V-1, p. 81;

I. T. 2296, C. B. V-2, p. 65;

G. C. M. 20853, 1938-2 C. B. 166.

No less an authority than Mertens in *Law of Federal Income Taxation,* Vol. 6, par. 34.19, (1949 Ed.) stated:

"The proper test would seem to be the use to which the income is put and not its source."

This Court has had the matter before it in *Squire v. Students Book Corp.,* 191 F. 2d 1018 (1951) wherein this Court has indicated its agreement with the general rule, although it did not expressly so hold in that case. The only Circuit which rejects the destination test is the Fourth Circuit (*United States v. Community Services, Inc.,* 189 F. 2d 421 (1951)).

The Tax Court itself has held, until recently, that destination controlled over source. Three of the leading cases were:

Sand Springs Home, 6 B. T. A. 198 (1927);

Simpson Estate, 2 T. C. 963 (1943);

United School of Christianity, 4 B. T. A. 61 (1926).

In 1950 the Tax Court had before it the famous case of *C. F. Mueller Co.,* 14 T. C. 922, and in a divided opinion the majority of the Tax Court held, contrary to prior cases, that business activity of an otherwise qualified corporation served to remove its exempt status. The Tax Court has consistently held in accord with the *Mueller* decision, despite the reversal of the latter by the Third Circuit.

American Ass'n of Engineers Employment, Inc., T. C. Docket 22919, memo. op. 3/7/52; aff'd 204 F. 2d 19 (C. A. 7th, 1953);

Donor Realty Corp., 17 T. C. 899 (1951);

Danz, 18 T. C. 454 (1952);

Eastman Corp., 16 T. C. 1502 (1951).

Petitioner points to this history to show more than that a majority of courts considering the question at issue have disposed of it favorably to petitioner's position. An examination of the leading cases which have been cited above reveals the fact that in March, 1947, the date of incorporation of petitioner, there was not a *single* case which held that the mere operation of a business by an otherwise exempt corporation would destroy the exempt status. It can be safely assumed, in line with our philosophy of Anglo-American jurisprudence, that petitioner was organized by its founders in reliance upon the proposition that judicial precedent is, except in case of palpable mistake or error, overruled not by subsequent cases but only by subsequent legislation. This is the cornerstone of the doctrine of *stare decisis* and is based upon the principle that the law by which men are governed should be fixed, definite, and known. Acting in reliance, then, upon twenty-three years of holdings adhering to the principle of the *Sagrada* case, not only did the founders organize

petitioner but Mr. Eaton gave to petitioner property costing him some $50,000.00 [R. 33]. It was fully four years after petitioner was organized that the first decision adverse to the principles upon which Mr. Eaton and the other founders had relied was enunciated (*United States v. Community Services, Inc., supra*). It is submitted that, under these circumstances, the approach of *Willingham v. Home Oil Mill, supra,* invoking the doctrine of equitable estoppel is not only appropriate but requisite to a just adjudication in the instant case.

(2) The Legislative History of Internal Revenue Code Section 101(6) Shows That Destination Controls Over Source.[1]

The legislative source of Section 101(6) is the Act of Congress, August 5, 1909, Chap. 6, sec. 38, 36 Stat. 113, commonly known as the Corporation Excise Act of 1909.

The origin of the Corporation Excise Act of 1909 was a Senate Finance Committee amendment introduced June 25, 1909, by Senator Aldrich (hereinafter called the Aldrich amendment) to a tariff bill (H. R. 1438). The Aldrich amendment was designed to tax "every corporation, joint stock company or association organized for profit and having a capital stock represented by shares * * *" (p. 3836). This language was never amended and appears in the Act (36 Stat. 112).

The Aldrich amendment contained no exceptions to its application. On July 2, 1909, Senator Bacon offered an

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[1]Petitioner's counsel acknowledges his indebtedness, for this portion of the brief, to the research by J. O. Kramer, Esq., in connection with the appeal of *Donor Realty Corporation,* 17 T. C. 899 (appeal dismissed by stipulation March 19, 1953).

amendment to the Aldrich amendment which read as follows:

> "Provided, That the provisions of this section shall not apply to any corporation or association organized and operated for religious, charitable, or educational purposes, no part of the profit of which inures to the benefit of any private stockholder or individual, but all the profit of which is in good faith devoted to the said religious, charitable, or educational purpose" (pp. 4037, 4061).

Senator Bacon's amendment was tabled after debate (p. 4062). Senator Aldrich during the debate stated:

> "I will say to Senators that my impression is that it would be better for the Senate to adopt the [Aldrich] amendment as it stands. The committee will then consider its effect; and before the bill finally passes they will perhaps have some amendments to suggest with reference to fraternal and benevolent organizations. *My own opinion is that benevolent organizations are all now exempted by the terms of the [Aldrich] amendment as it stands. Of course none of us want to tax that class of corporations,* and if the [Aldrich] amendment should be adopted as it stands, the committee will give very careful consideration to all these propositions for exemption" (p 4049). [Italics supplied.]

On July 6, 1909, the Senate, as in Committee of the Whole, resumed the consideration of the bill. Senator Bacon again offered his amendment (p. 4149) over the objection of Senator Aldrich. During the proceedings Senator Bacon stated that his amendment was necessary because there were corporations, such as the Methodist Book Concern,

> "* * * which is a very large printing establishment, and in which there must necessarily be profit

made, and there is a profit made *exclusively* for religious, benevolent, charitable, and educational purposes, in which no man receives a scintilla of individual profit. Of course if that were the only one, it might not be a matter that you would say we would be justified in changing these provisions of law to meet a particular case, but *there are in greater or less degree such institutions scattered all over this country.* If Senators will mark the words, the [Bacon] amendment is very carefully guarded, *so as not to include any institution where there is any individual profit; and further than that, where any of the funds are devoted to any purpose other than those which are religious, benevolent, charitable, and educational.* It is guarded *so as not to include in the exemption any corporation which has joint stock or in which any individual can receive a dividend for his personal use,* and it is further guarded *so as not to include any corporation which assesses any part of its revenue for any purpose other than those which are mentioned—religious, benevolent, charitable, and educational"* (p. 4151). [Italics supplied.]

Senator Flint then asked Senator Bacon "whether or not, in his opinion, we have not exempted them by the words 'corporation, joint stock company, or association organized for profit?'" Senator Bacon replied:

"I think not, Mr. President. I have the illustration of the Methodist Book Concern for that reason. *It is organized for profit, but it is not organized for individual profit. It is organized to make a profit to extend religious work and to extend benevolent work, charitable work, and educational work. It is organized for profit and does make a profit. That is the very reason why I think the words of the [Aldrich] amendment with a reference to a corporation tax are not sufficient* * * * There is but one word

that I can suggest to make that [the Bacon amendment] stronger, which I am willing to incorporate, and that is after the word 'operated' to insert the word 'exclusively' so that it will read in this way:

"'*Provided,* That the provisions of this section shall not apply to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the profit of which inures to the benefit of any private stockholder or individual, but all the profit of which is in good faith devoted to the said religious, charitable, or educational purpose.'

"It seems to me that would make it as complete as it is possible to do" (p. 4151). [Italics supplied.]

Senator Bacon then concluded by stating:

"That [the insertion of the word 'exclusively'] will make it much more emphatic" (p. 4151).

After further discussion the Bacon amendment was modified as to form but not substance, reading as follows:

"*Provided, however,* That nothing in this section shall apply to labor organizations * * *; nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the profit of which inures to the benefit of any private stockholder or individual, but all of the profit of which is in good faith devoted to the said religious, charitable or educational purpose" (p. 4156).

It was in this form when the Senate passed the bill two days later (p. 4316). It then went to a committee on conference.

The conference report was read to the Senate on August 2, 1908, two days after the House of Representatives had

accepted it (p. 4755). The committee on conference had agreed to an amendment to the provision in question which was reported out as follows:

> "Sec. 38. That every corporation, joint stock company or association, organized for profit and having a a capital stock represented by shares * * * shall be subject to pay annually a special excise tax * * *: *Provided, however,* That nothing in this section shall apply to labor, agricultural or horticultural organizations * * *, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual" (p. 4778).

The Senate agreed to this version by accepting the report on August 5, 1909 (p. 4949) and in this form it was approved by the President (36 Stat. 112, 113).

Thereafter in each Revenue Act, and ultimately in the Internal Revenue Code, Congress has on eleven occasions reenacted the exemption provisions in substantially the same form. Today all the original words, except two, remain. Subsequent amendments have both provided further exemptions and limited the activities of exempt organizations to those which do not encompass carrying on propaganda and attempting to influence legislation. The two words which have changed are "income," which now reads "earnings," and "stockholder," which has been replaced by "shareholder," changes which are not material to the issue.

The foregoing early legislative history clearly shows that a corporation, organized for profit, could be exempt provided that it was not organized for individual profit and provided further that the profits were devoted to re-

ligious, charitable, or educational purposes. Such legislative history clearly then supports the majority of the jurisdictions which have decided this issue.

The later legislative history of the Internal Revenue Code Section 101(6) serves only to buttress petitioner's position. With the view to increasing the revenues, in 1942,

> *Hearings before the House Ways and Means Committee on Revenue Act of 1942, Vol. 1, p. 89,*

and again in 1943,

> *H. Report 871,* 78th Cong., 1st Sess., p. 24;
>
> *S. Report 627,* 78th Cong., 1st Sess., p. 21,

Congress had before it for consideration the matter of changing Internal Revenue Code Section 101(6) to overcome the cases granting exemption which have been discussed above, but the section was left unchanged. It was not until 1950 that a change was made. This change was "on a wholesale scale" made "for reasons of policy rather than simply for the collection of additional revenue;" it is important to note that "the Congress specifically provided that no implication should be drawn from the amendments of 1950 as respects the previously effective exemption."

> *C. F. Mueller Co. v. Com'r,* 190 F. 2d 120 (C. A. 3rd, 1950).

This Court has joined the Third Circuit in stating that the 1950 amendments "declared a different rule" for tax years commencing after December 31, 1950, than had prevailed previously.

> *Squire v. Students Book Corp., supra.*

Thus Congress itself has simply fortified the conclusion that the *Sagrada* and *Roche's Beach* rule of the controlling significance of destination was the law in effect during the tax periods of petitioner which are here involved, and that such law should be followed in the instant case. It is submitted that this is particularly true because of the justifiable and unreproachable reliance by petitioner and its founders upon the uniform state of the law existing at the time of petitioner's organization.

(3) The Destination of Petitioner's Income Was Religious and Charitable.

On the assumption that this Court is ready to adopt the position that the destination is more important than the source of income in the determination of petitioner's exempt status, there yet remains the question as to what the destination of petitioner's income, in fact, was. Petitioner submits that the answer to this question is that the destination was exclusively charitable and religious within the intendment of Internal Revenue Code Section 101(6).

It has been previously noted that petitioner's Articles themselves expressly so state. Moreover, the founders of petitioner testified to the same effect [R. 19, 26]. Such intentions, as expressed in the Articles and in the Record, serve to show that the destination of petitioner's income was exclusively religious and charitable, for they establish that none of such money was to inure to the benefit of any private individual personally interested in petitioner. This conclusion is further bolstered by the affirmative injunction appearing in the Articles that "This corporation is one which does not contemplate pecuniary gain or profit to the members thereof * * *."

There is next to be considered, however, the admitted absence of an express prohibition in the Articles against the return of assets to petitioner's founders on dissolution. If dissolution were to take place, the distribution of petitioner's assets to its founders would do violence to all that has been mentioned above. Such a factual situation is not to be assumed,

> *Goldsby King Memorial Hospital,* T. C. Docket 204, memo. op., 7/19/44;
>
> *Koon Kreek Klub v. Thomas,* 108 F. 2d 616 (C. A. 5th, 1939)

particularly where, in the minds of petitioner's founders, a contrary result obtained. Thus, Eaton testified [R. 18]:

> "I realized when I made a contribution to set up the foundation of $50,000.00 that I had known that none of that money, not one penny of it, could ever come back to me in any way. I knew that when I gave it."

Eaton further testified [R. 19]:

> "Well, like I stated before, it has always been in my mind and I have always understood and have taken for granted that the money, the assets of the foundation would go to the charities and to the Christian organizations that are listed in the Minute book, those approved, because that is what it was set up for in the first place, and there is no desire to do anything else with it. There has never been any idea of anything else."

In this connection Eaton's answer to the question asked in the exemption affidavit in 1948 is also enlightening [R. 19, 20].

Moreover, as the Record shows [R. 17, 26] dissolution of petitioner is, at best, a remote possibility and as

such is to be ignored in determining petitioner's exempt status.

> *Miss Harris' Florida School, Inc.,* B. T. A. Docket 100054, memo. op., 5/28/40 (Appeal dismissed C. A. 5th).

In connection with this subject, attention is called to the stipulation entered into between petitioner and respondent. Paragraphs 12(a), 13(a) and 14(c) [R. 3, 4, 5] refer to transfers whereby the Eatons *"gave to petitioner without consideration"* certain assets and refer further to acceptance by the Board of Directors of petitioner of *"said gifts."* This language of the stipulation is to be accorded its natural meaning.

> *Weaver v. Com'r,* 58 F. 2d 755 (C. A. 9th, 1932).

Thus, the interpretation of an absolute gift should be preferred by the Court in the instant case over any interpretation connoting a conditional or qualified transfer with strings attached.

The remote legal possibilities which perhaps can be found in petitioner's articles are to be measured, not by technical legal doctrine, but rather in the light of the actual facts of the case. This position is supported by the language of the Board of Tax Appeals in *Unity School of Christianity, supra,* wherein, at page 70, the court stated:

> "By its charter this corporation might lawfully have been used as the means of increasing the wealth of its founders and stockholders. But the evidence is all to the effect that this was never the purpose or intent and has not been the effect. Looking to the purpose, as the statute requires, it becomes a question again of fact, as disclosed by evidence, and this is not determined by what might otherwise have been consistent with the charter."

It is recognized that this particular phase of the discussion might more properly be placed in the section of this brief dealing with the "inurement of earnings" test, since it deals with the question of the receipt or possible receipt by interested individuals of benefits from petitioner. But the isolation of particular facts into a single doctrinal pigeonhole is often difficult in this type of case. Nonetheless, in this connection petitioner wishes to call particular attention to the use of the word "inures" in Internal Revenue Code Section 101(6) rather than the use of such term as "could inure to" or "might inure to." The present tense of the statutory language leads one to the conclusion that Congress had in mind granting an exempt status *so long as* certain conditions were met, and denying them when other conditions might prevail at a later date. This conclusion finds support in *Koon Kreek Klub v. Thomas, supra,* where the 5th Circuit stated (p 618):

> "* * * [T]he exemption applies to profits *so long as* they are retained by the organization or used to further the purposes which are made the basis of the exemption, and are not otherwise used for the benefit of any private shareholder." [Emphasis supplied.]

The Tax Court in *Goldsby King Memorial Hospital, supra,* quoted the above language with approval, and held, as did the *Koon Kreek Klub* case, that the possibility of gain on dissolution would not affect the determination of the exempt status of an organization for an earlier year.

An additional basic question raised in this case relates to the matter of retention of a portion of petitioner's

earnings in place of the current distribution of the whole thereof. It will be assumed at this point that no question can be raised as to the justification from petitioner's standpoint of the retention of a portion of its earnings, and that such retention was not a matter foreign to the achievement of its sole purpose of donating to charitable and religious organizations.

It is submitted that such retention of current earnings does not destroy an otherwise exempt status. In the famous *Mueller* case, *supra,* the taxpayer had borrowed $3,550,000.00 from the Prudential Insurance Company of America, repayable within fifteen years. The loan agreement required that 75% of the income of the taxpayer be used to reduce the loan to $1,500,000.00 and that thereafter payments to New York University could not exceed 25% of the excess of the net earnings over the net losses of the taxpayer until the debt was paid. Significantly, neither the Tax Court in denying exemption nor the Third Circuit upholding it, ever mentioned the contractual non-availability of an appreciable portion of the taxpayer's net earnings.

Likewise, in *Goldsby King Memorial Hospital, supra,* the taxpayer's income was completely absorbed by the liquidation of a mortgage, the construction of additional facilities and the purchase of equipment. Despite this use of net earnings, the Tax Court held that the statutory exemption applied.

Thus if, in the instant case, it is agreed that the ultimate destination of petitioner's income and assets was charitable and religious, the mere retention of income in a particular year would appear to be non-determinative of its exempt status.

On this subject, the Record is significant. On cross-examination, Eaton was asked [R. 21]:

> "Q. You were aware, were you not, Mr. Eaton, that under the Articles of Incorporation that the directors of the foundation were not required, actually required to turn over any money to any charities, that it was a matter left entirely to their discretion. You understood that?"

To this question, Eaton replied [R. 21]:

> "A. I understood it to this end only, that we had the position of directing that money, but *I never did have any understanding that any of the money would not go to charities, but always that it would go there.* There is no question in my mind or has there ever been." [Italics supplied.]

It is submitted that such expressions of purpose and intention, when considered in the light of all surrounding circumstances and of the applicable law, compels the conclusion that petitioner was operated exclusively for charitable and religious purposes.

Conclusion.

Petitioner respectfully submits that it satisfies all conditions laid down by Internal Revenue Code Section 101(6), as said conditions are revealed by the legislative history of that section and by the cases decided thereunder, and is therefore entitled to an exempt status. The Tax Court should be reversed.

Respectfully submitted,

MARTIN H. WEBSTER,

Attorney for Petitioner.

Dated: January 12, 1954.

No. 14047

IN THE

United States Court of Appeals For the Ninth Circuit

RALPH H. EATON FOUNDATION, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for Review of the Decision of the Tax Court of the United States

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BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court (R. 28-41) is not reported.

JURISDICTION

The Commissioner determined deficiencies in income tax for the period from March 12, 1947, to January 31, 1948, and for the fiscal year ending January 31, 1949, and added penalties for both periods. The notice of deficiencies was mailed to taxpayer on July

21, 1950, and the petition for review by the Tax Court was filed on October 12, 1950. Accordingly the petition was filed within the 90-day period allowed by Section 272 of the Internal Revenue Code. After hearing on such petition, the Tax Court entered its decision on June 8, 1953, determining deficiencies in income tax in the total amount of $24,486.93 but held that no penalties were due. (R. 42.) A petition for review by this Court was filed on August 17, 1953.[1] The Court accordingly has jurisdiction of the case under Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether the Tax Court correctly held that the taxpayer, a corporation which has been engaged in ordinary business activities for profit, is not entitled to exemption from income tax under Section 101(6) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set forth in Appendix A, *infra.*

STATEMENT

The pertinent facts as found by the Tax Court are as follows (R. 29-38):

Taxpayer is a corporation organized under the laws of Arizona in March 1947. Taxpayer's incorporators

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[1] The dates which are given above without record citations do not appear in the record but they have been verified by reference to the Tax Court's records.

were Ralph H. Eaton, Frances M. Eaton, his wife, and Thomas H. Kent, Jr. They were elected directors and also president, vice president and secretary-treasurer, respectively, which positions they still held in May 1952. Taxpayer has no capital stock outstanding and the articles of incorporation expressly prohibit the issuance of capital stock. (R. 29.)

Taxpayer's articles of incorporation describe the nature and purpose of its proposed business as (R. 29)—

> To foster and promote Christian, religious, charitable and educational enterprises.
>
> * * * * *
>
> This corporation * * * does not contemplate pecuniary gain or profit to the members thereof * * *

The articles also set forth a detailed doctrinal statement which provide (R. 29-30):

> Article IV.
>
> The foundation upon which this corporation is based is a heart-conviction of the truth of the following Doctrinal Statement:
>
> 1. We believe that the entire Bible is the inspired and inerrant word of God, the only infallible rule of faith and practice.
>
> 2. We believe that the Lord Jesus Christ is the only begotten Son of God, conceived by the Holy Spirit and born of the Virgin Mary.

3. We believe in the literal, bodily, physical and premillennial return of Jesus Christ.

4. We believe in the sacrificial and vicarious death of the Lord Jesus Christ on the cross and that He thereby made perfect substitutionary atonement for the sin of the world.

5. We believe that all men are sinners and in an eternally lost condition apart from the saving grace of the Lord Jesus Christ.

6. We believe that acceptance into the family of God and eternal salvation can only be secured by believing in and by faith accepting and receiving the Lord Jesus Christ as personal Sin-bearer, Lord and Saviour.

The articles direct that each director must reaffirm the doctrinal statement annually, in writing, and that such reaffirmance must be filed with taxpayer's permanent records. (R. 30.)

Ralph H. Eaton, who joined the Capital Christian Church of Phoenix, Arizona, in 1931, and has been closely associated with a number of religious organizations, became interested in such a foundation in 1944 when he attended the international convention of the Christian Business Men's Committee in New York City. While there he heard a speech by an industrialist who had contributed money to charities and Christian work through his own charitable foundation, and he later read a book by the same individual which further described the part played by religion in his business pursuits. At that time Eaton's principal source of

income was the Eaton Fruit Company, a business owned by him and his two brothers. (R. 31.)

Kent, after graduating from Butler University, went to work for the Eaton Fruit Company in 1941, and joined the Eaton-Heiskell Construction Company in 1945 as bookkeeper. In January 1948 he became a salaried employee of taxpayer. His duties were to act as office manager, bookkeeper and business manager, and to keep taxpayer's minute book. Mr. and Mrs. Eaton had known Kent since about 1937, having been members of the same church and of many religious and charitable organizations. (R. 31-32.)

For about two years prior to the organization of taxpayer, Kent and the Eatons discussed its formation and, in or about February, 1947, they secured Robert Weaver, an attorney of Phoenix, Arizona, to draw up the articles of incorporation except the doctrinal statement which the three incorporators drafted after numerous deliberations. (R. 32.)

In March 1947 Mr. and Mrs. Eaton transferred to taxpayer certain farm and office equipment in order to enable it to engage in farming business operations. This equipment had cost $1,843.66. The Eatons also transferred to taxpayer at about that time all their right, title and interest in certain growing crops on which they had advanced to the date of transfer a sum of $3,520.79, and taxpayer agreed to repay that sum to the Eatons. (R. 32.)

In the spring of 1945, Eaton purchased 110 acres of land in Phoenix, Arizona, and transferred such land to a corporate trustee pursuant to two trust agreements. This land was subdivided into lots and, after

selling one-tenth interest to George Heiskell, the Eatons transferred their remaining nine-tenths interest in the trusts to taxpayer in April 1947. The net cost of their interest was $27,410.62. On January 1, 1948, Eaton also transferred his partnership interest in Eaton & Heiskell Construction Company, a business engaged primarily in contracting the construction of small residences. The total cost to the Eatons of transfers to taxpayer during its first fiscal year aggregated approximately $50,000. (R. 32-33.)

During the periods involved here, taxpayer was engaged in farming, selling real estate, constructing small residences, and selling sport clothes. (R. 33.) Its activities in these four businesses are as follows:

1. Taxpayer's farming operations were conducted on land held under five leases. Under a lease dated March 20, 1947, taxpayer leased from Eaton 80 acres of land known as the L Avenue Ranch for one year beginning February 1, 1947, at a rental of $40 per acre per year, and this lease was renewed for another year at the same rental. Taxpayer also leased land known as the Swant Ranch from E. H. Swant for one year beginning July 1, 1947, at a rental of $30 per acre per year. On or about July 1, 1948, Eaton purchased the Swant Ranch and entered into a new lease between himself and taxpayer for one year beginning July 1, 1948, at a rental of $40 per acre per year. (R. 33-34.)

On or about April 1, 1948, Eaton purchased 40 acres of farm land on Ramona Road, Phoenix, Arizona, and leased 35 acres thereof to taxpayer for a period of one year beginning April 1, 1948, at a rental of $40 per acre

per year. Taxpayer also leased a ranch known as the Rousseau Ranch for six months beginning July 1, 1948, at $60 per acre per year, and the Mann Ranch for one year beginning August 1, 1947, at a rental of $35 per acre. The latter lease was renewed at its expiration for an additional six months at $45 per acre per year. (R. 34.)

Neither the manager of taxpayer's farming operations nor the lessors of the land referred to are related to Kent or the Eatons, nor do they have any interest in taxpayer. (R. 34.)

Taxpayer's net income from its farming operations during the periods in controversy was as follows (R. 34):

3/12/47 to 1/31/48	$16,731.14
2/ 1/48 to 1/31/49	7,095.23

The L Avenue Ranch was formerly leased by Eaton to the Eaton Fruit Company at the same rental later paid by taxpayer. Eaton charged taxpayer for the rental of his lands because of financial necessity. He had purchased the Swant Ranch and Ramona land on an installment basis, and his combined payments per year, including amortization of principal on these properties, were more than three times the rental he received from taxpayer. He also expended substantial sums in improving these properties. (R. 35.)

2. Taxpayer's real estate operations consisted of selling subdivided lots contained in the land which had been subject to the trust agreements. Taxpayer's net

income from these operations for the periods in controversy was as follows (R. 35):

3/1/47 to 1/31/48	$49,089.41
2/1/48 to 1/31/49	2,784.06

3. In 1945 Eaton entered into a partnership with George M. Heiskell under the name of Eaton & Heiskell Construction Company, to engage in general contracting and in January 1948 taxpayer purchased Heiskell's interest in the company for its book value. Simultaneously Eaton donated his interest in the company to taxpayer and taxpayer has operated the business under its original name since that time. Heiskell was employed to manage the business for taxpayer under a written contract, the terms of which provided for one year of employment beginning January 1, 1948. The term was extended in fact for an additional month, to January 31, 1949. Heiskell is not related to the Eatons or to Kent. (R. 35-36.) Taxpayer derived the following net income from its construction operations during the periods in controversy (R. 36):

3/12/47 to 1/31/48	(none)
2/ 1/48 to 1/31/49	$7,551.52

4. On June 2, 1947, pursuant to authorization of its directors, taxpayer acquired the distributorship within the State of Arizona of certain sport clothes manufactured by one C. F. Smith. Taxpayer operated this business under the name of "Hollywood Sportogs of Arizona", and was to receive 10 per cent of all gross sales. This business activity was discontinued on June

1, 1948, due to management difficulties and lack of sales. Taxpayer incurred net losses from this business during the periods in controversy as follows (R. 36):

3/12/47 to 1/31/48	($533.83)
2/ 1/48 to 1/31/49	(134.39)

Taxpayer's directors discussed its business activities fully before undertaking each of them, and were completely agreed on taxpayer's course of action in all cases. (R. 36.)

At a meeting of the directors on May 1, 1947, taxpayer adopted a list of 26 named beneficiaries engaged in charitable or religious work to whom its funds would be made available, in its discretion. It also provided for contributions of not more than $10 by taxpayer's president to miscellaneous organizations engaged in charitable and religious work, without necessity for consulting the board. At a board meeting held on January 1, 1949, seven additional named beneficiaries were added to taxpayer's list. This list was compiled after a thorough investigation of the activities of each organization. Taxpayer kept a file on each. All beneficiaries had to be and are engaged in activities which carried out the purposes and ideas for which taxpayer was established. None of them is engaged in the carrying on of propaganda or in efforts to influence legislation. None of them has any private, beneficial or personal interest in taxpayer. No beneficiaries are individuals; any names of individuals on taxpayer's list appear as representatives of an organization. (R. 36-37.) During the periods in controversy,

taxpayer made contributions to beneficiaries as follows (R. 37):

3/12/47 to 1/31/48	$4,240
2/ 1/48 to 1/31/49	2,310

In addition to monetary contributions, taxpayer rendered consultative services to some beneficiaries. Taxpayer's officers assisted in planning two church building programs. (R. 37.)

Except for rental payments, interest on money borrowed, payment for costs advanced by Eaton on certain equipment and growing crops, and repayment of loans, taxpayer paid nothing of tangible value to Eaton or to his family during the instant taxable years. Eaton rendered substantial services to taxpayer. The only compensation received by Kent is a weekly salary of $100, paid since January 1, 1948, when he began devoting his full time to taxpayer's affairs. He has rendered substantial services to taxpayer. (R. 37.)

The Tax Court held that the taxpayer was not entitled to exemption. Accordingly it decided that there are deficiencies in income tax for the period from March 12, 1947, to January 31, 1948, of $23,263.05, and for the year ending January 31, 1949, $1,223.88. (R. 42.)

SUMMARY OF ARGUMENT

1. The Tax Court correctly held that the taxpayer is not entitled to exemption under Section 101 (6) of the Internal Revenue Code, which requires a corporation to show, among other things, that it has been "organized and operated exclusively" for religious,

charitable or educational purposes. We submit that this means that exemption should be denied unless the organization itself has a religious, charitable or educational function and such function should be its sole purpose. Consequently a corporation organized and operated as an ordinary commercial business enterprise, as was the taxpayer here, cannot meet the statutory requirement for even if it is conceded that it has more than one purpose, it clearly has a business purpose and the presence of such purpose precludes it from showing that it was organized and operated *exclusively* for any of the approved purposes set out in Section 101 (6).

2. The correctness of the Tax Court's interpretation is further shown by the provisions of Code Section 101(14). Congress was aware that the net earnings of an organization which is not itself organized and operated exclusively for any approved purpose might be destined for exempt corporations. Nevertheless it has limited the exemption in such cases to corporations whose sole function is to hold title to property, collect income and turn it over to the exempt organizations. Thus, if Section 101 (6) is construed as taxpayer requests, the express limitations in Section 101 (14) will be meaningless.

That Congress did not intend to exempt a business corporation is further shown by the limitations on deductions in Code Section 23 (q)(2).

3. There has been some difference of opinion expressed in the applicable decisions but we submit that the taxpayer is in error in contending that the majority

hold that destination of income rather than its source should be the controlling factor. It appears that cases which emphasize destination rely on the leading case of *Trinidad* v. *Sagrada Orden,* 263 U. S. 578, but in doing so have misinterpreted the Supreme Court's opinion. That case involved a religious organization and such fact was conceded by the Government. Thus its operations for profit were not only a minor part of its activities but closely connected with its religious enterprises. The Supreme Court did not indicate there that those organized for business and operating for financial gain should be given exemption.

There are only four cases which appear to make destination the sole test and two of these (*Roche's Beach, Inc.* v. *Commissioner,* 96 F. 2d 776 (C.A. 2d), and *Willingham* v. *Home Oil Mill,* 181 F. 2d 9 (C.A. 5th)) actually do not make destination the sole test for the taxpayer in each case acted as a medium through which the wholly exempt organization therein functioned. But in the other two cases (*C. F. Mueller Co.* v. *Commissioner,* 190 F. 2d 120 (C.A. 3d), and *Sico Co.* v. *United States,* 102 F. Supp. 197 (C. Cls.)) the taxpayers were regular business organizations with business purposes. Thus the courts there erred in allowing them exemption and in so doing misinterpreted the decisions relied on therein.

4. The legislative history does not support the taxpayer's contention. There is little, if any, value in the Congressional debates, on which taxpayer relies, but what there is indicates that Congress intended to give exemption only to institutions which actually have

religious, charitable or educational functions. This is shown in later enactments, especially in the additions to the law in 1950 which may be referred to because they did not change the existing law but merely clarified it.

ARGUMENT

THE TAX COURT CORRECTLY HELD THAT THE TAXPAYER IS NOT ENTITLED TO EXEMPTION UNDER SECTION 101 (6) OF THE INTERNAL REVENUE CODE.

A. Applicable Provisions of the Statute and Regulations

In order to claim exemption under Section 101(6) of the Internal Revenue Code (Appendix A, *infra*), a a corporation must show (1) that it has been "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes", and (2) that no part of its net earnings inures to the benefit of any private shareholder or individual.[2] The longstanding Regulations issued pursuant to Section 101(6) makes it clear that these requirements constitute separate conditions and both are prerequisites to exemption. See Section 29.101(6)-1 of Treasury Regulations 111 (Appendix A, *infra*).

It is important to note that both requirements must be met because, as we shall point out below, some courts have held that a claim to exemption is to be determined entirely by the ultimate destination of the claimant's income. That is of course merely another way of saying that it is only the second statutory requirement

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[2] There is a third statutory requirement which prohibits the carrying on of propaganda to influence legislation but that will not be discussed as it does not appear that the taxpayer has been so engaged.

which is of any importance and that a corporation will be treated as if it were organized and operated for the required statutory purpose if its income is to be used for such purpose. Obviously that is not what the statute says and we cannot believe that Congress meant for the first requirement of Section 101(6) to be watered down and made meaningless in that way. Accordingly we shall begin our consideration here with the first requirement as to which it is our position that the taxpayer has not and cannot satisfy its terms, and that was also the holding of the Tax Court.

The taxpayer states (Br. 15) that the Tax Court did not specifically indicate the basis for denying the exemption but we do not agree. The Tax Court made it very clear that it had not changed its thinking on Section 101 (6) in spite of a reversal of its decision in *C. F. Mueller Co.* v. *Commissioner,* 14 T.C. 922, by the Court of Appeals for the Third Circuit. (See 190 F. 2d 120.) Thus the Tax Court took the same position here that it has frequently announced in other cases including *Danz* v. *Commissioner,* 18 T.C. 454, which is now pending in this Court on taxpayer's appeal, and in which the Tax Court stated the basis for its denial of exemption as follows (p. 461):

> This Court has held that where a corporation was organized and operated to carry on a regular business under circumstances similar to those here present, it is not exempt by section 101 (6) because it was not organized and operated "exclusively" for the purposes mentioned in that provision.

It will be seen that the Tax Court, in the *Danz* case, emphasized the word "exclusively" and we think that it should be emphasized. However the word has been largely ignored by those who place their reliance on the destination of the income rather than its source. But when the word "exclusively" is given its necessary meaning, it becomes apparent that a claimant does not meet the statutory requirements merely by showing that it has one purpose which is within those named in Section 101 (6). Instead it must be shown that such purpose is absolutely the only one for which it was organized.

The necessity of this was pointed out in *Better Business Bureau* v. *United States,* 326 U. S. 279, in which it was held that the taxpayer was not an educational organization and so not exempt from employment taxes under a statutory provision containing the same language as Section 101 (6). There, the Supreme Court said (p. 283):

> Even the most liberal of constructions does not mean that statutory words and phrases are to be given unusual or tortured meanings unjustified by legislative intent or that express limitations on such an exemption are to be ignored. * * *
>
> In this instance, in order to fall within the claimed exemption, an organization must be devoted to educational purposes exclusively. *This plainly means that the presence of a single non-educational purpose, if substantial in nature, will destroy the exemption regardless of the number or*

importance of truly educational purposes. * * * (Italics supplied.)

Accordingly, even if we take the most favorable view for the taxpayer here and assume that it did have a purpose acceptable under Section 101 (6), it cannot meet the statutory requirement for it also had a business purpose. Indeed, under our interpretation of taxpayer's articles of incorporation, taxpayer actually had only one purpose and that was a purpose to carry on a commercial business. We are of course aware that the articles of incorporation state that the "general nature of the business proposed to be transacted" is "To foster and promote Christian, religious, charitable and educational enterprises". (Appendix B, *infra.*) But that statement does not mean that the taxpayer was intended to operate as a religious, educational or charitable organization. Instead, it is evident that the organizers of taxpayer intended only that the net profits from various business activities would be turned over to religious, educational or charitable organizations. Thus we think it is evident that taxpayer's sole function is the carrying on of business for profit, and that it cannot be said that taxpayer itself has a religious, charitable or educational function. Certainly there is absolutely nothing in the articles of incorporation authorizing or requiring the taxpayer to undertake religious, charitable or educational work itself. On the other hand, the articles set forth a detailed description of the kind of commercial business the taxpayer is to engage in. See Article III of the Articles of Incorporation (Appendix B, *infra.*)

Thus, by the broad business powers granted, it seems evident that the taxpayer's organizers intended its sole function to be the transaction of commercial business.

We submit that since the taxpayer does not itself have a religious, charitable or educational function to perform, it does not meet the requirements of Section 101 (6). But, even if we are wrong in this interpretation, and this Court holds that the taxpayer does have one function or purpose which is required by the statute, it still should be denied exemption for, as we have pointed out, it also has a business purpose. This being so, it cannot properly be said that the taxpayer was organized *exclusively* for a religious, charitable or educational purpose. And the same is even more apparent as to taxpayer's operations during the taxable periods here.

The taxpayer's principal activities have not been religious, charitable or educational. Indeed such activities have not had even the remotest connection with any religious, charitable or educational enterprises.[3] This must be admitted because the record shows (R. 33-35) that the taxpayer has been actively engaged in four separate business enterprises, namely, farming, selling of real estate lots, selling of sport clothes, and a construction business. In this respect, the situation is the same as that in *Bear Gulch Water Co.* v. *Commissioner,* 116 F. 2d 975 (C.A. 9th), certiorari denied,

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[3] The Tax Court found that the taxpayer had rendered consultative services to some beneficiaries and had assisted in planning two church building programs. (R. 37.) But these services are clearly a minor part of its activities and so must be treated as merely incidental to its principal business activities.

314 U. S. 652. It will be recalled that the taxpayer there was a corporation wholly owned by the Regents of the University of California but this Court nevertheless denied it exemption and in doing so pointed out that its business was "a business enterprise conducted for gain". (P. 977.)

As that is also true here, it is evident, as we have already stated, that the most which can be said in taxpayer's favor is that it was organized and operated for dual purposes, i.e., (1) to engage in business for profit and (2) to turn over its profits to such religious, charitable or educational organizations as taxpayer's members may select from time to time. Consequently, even if we concede that there may be two purposes here, taxpayer's case still falls far short of being one in which a corporation has been *organized* and *operated exclusively* for one of the required purposes designated by Congress in Section 101 (6).

The facts here are very similar to those in *United States* v. *Community Services,* 189 F. 2d 421 (C.A. 4th), certiorari denied, 342 U. S. 932, in which exemption was denied to a corporation which was actively engaged in various business enterprises but claimed that it was a charitable organization because its charter and by-laws provided for its net earnings to go to charitable institutions. In denying taxpayer's claim, the court there said (pp. 424-425):

> Taxpayer was, in effect, organized and operated for two purposes: (1) to engage in commercial business, for profit, and (2) to turn over the profits realized from its commercial activities to chari-

> table organizations. The second purpose is charitable; the first purpose clearly is not. To qualify for the exemption here, the corporation must be "organized and operated *exclusively* for * * * charitable * * * purposes". * * *
>
> * * * not one of taxpayer's *activities* was charitable. On the contrary, these activities were all commercial.
>
> For tax-exemption purposes, the charitable nature of the distributees of its income cannot be attributable to the taxpayer. The corporation earning the income and claiming the exemption, rather than the recipients of the income, must be organized and operated exclusively for charitable purposes. Otherwise a purely commercial corporation could claim the exemption, if all its stock were owned by an exempt corporation, which would receive, as dividends, all the net earnings of the commercial corporation. Clearly this is not the law. * * *

It will be seen that the Fourth Circuit adopted the view that the taxpayer there had two purposes which is contrary to our principal contention here as we think there is in fact only one purpose. But even if we agree as to corporations organized like the one there, it still is clear, as the court brought out so forcefully, that a business purpose precludes tax exemption. It should also be noted that the taxpayer's position in the *Community Services* case was stronger than that of the taxpayer here for the corporate charter

there specifically required all of taxpayer's net profits to "be devoted exclusively to religious, charitable, scientific, literary and/or educational purposes", and the by-laws contained the same provision. (p. 423.) But there is no provision in the articles of incorporation here as to how the taxpayer's net income is to be used. Instead there is only a general provision to "foster and promote" religious, charitable and educational enterprises.

Since the taxpayer has not met the first requirement of Section 101 (6), it is not helped by the fact that it may have met the second requirement, namely, that no net earnings inure to private individuals during the taxable periods. Furthermore, although we will assume that the taxpayer has met the second requirement, we think it proper in considering taxpayer's organization to point out that it is entirely possible that its net earnings may inure to private individuals in the future because there is no prohibition in the articles of incorporation either against such inurement of current earnings or against the taxpayer's assets reverting to a private individual in the event that taxpayer is liquidated at the end of its designated term of 25 years. Also the taxpayer may not only amend or repeal any provision in the articles of incorporation but the Tax Court found (R. 36) that the matter of distributing earnings is one entirely within the discretion of the taxpayer's officers and directors. Moreover, although the taxpayer had net income (above net losses) of $82,683.14 during the taxable periods here, only $6,550 was actually distributed to any beneficiaries. It is of

course up to the Eatons when those earnings will be distributed as they have been in control and will remain so during their lifetime. We enumerate these facts not only to show the possibility of net earnings being accumulated or diverted from religious and educational enterprises but also to show that taxpayer's organization and operations are permeated with what the Supreme Court described in the *Better Business Bureau* case, *supra*, p. 283, as a "commercial hue", and that should preclude allowance of exemption under Section 101(6).

B. The Correctness of the Tax Court's Interpretation of Section 101(6) is Shown by Other Statutory Provisions.

The Tax Court's decision here is confirmed by Section 101 (14) of the Internal Revenue Code (Appendix A, *infra*). In that subdivision, Congress addressed itself to situations in which a corporation, which does not itself qualify for exemption under subdivision (6) or one of the other subdivisions of that section, dedicates its income to another organization which does qualify. Section 101 (14) exempts —

> Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this chapter; * * *

Thus, Congress was fully aware of the possibility that the net earnings of an organization which is not itself organized and operated exclusively for exempt pur-

poses might be destined for other organizations which were so organized and operated, such as an exempt church or university. Yet it saw fit to limit the exemption in such cases to corporations and only to those whose function was that of "holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses", to exempt organizations. When Section 101 (14) is read together with Section 101 (6), as it must be (*Better Business Bureau* v. *United States, supra; Keystone Automobile Club* v. *Commissioner,* 181 F. 2d 402 (C.A. 3d)), it is manifest that Congress intended to accord tax exempt status to an organization on the basis of its own purposes and activities, not those of the recipients of its income, except in one type of situation—where a corporation serves merely as a holding and collecting medium for exempt organizations.

As the Fourth Circuit stated in *Community Services, supra,* p. 425:

> Had Congress intended to accord tax exempt status to a corporation, regardless of the nature of its own activities, solely because its profits are distributed to exempt organizations, it would have been an easy matter to say this, simply and clearly.

Instead, in Section 101 (14) Congress carefully circumscribed the exemption of distributing organizations by exempting only corporations whose exclusive purpose is of "holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses" to exempt organizations.

To construe Section 101 (6) as exempting any organization whose income is destined for exempt organizations is to render meaningless the express limitations contained in Section 101 (14). Unless the requirements of Section 101 (14) are to be discarded as sheer surplusage, the conclusion is inescapable that organizations engaged in ordinary business activities, as was the taxpayer here, are not entitled to exemption under Section 101 (6) merely because their profits inure to the benefit of exempt organizations. See *Bear Gulch Water Co.* v. *Commissioner, supra; Gagne* v. *Hanover Water Works Co.,* 92 F. 2d 659 (C.A. 1st); and *Universal Oil Products Co.* v. *Campbell,* 181 F. 2d 451 (C.A. 7th), certiorari denied, 340 U. S. 850. As Judge Learned Hand stated in his dissenting opinion in *Roche's Beach, Inc.* v. *Commissioner,* 96 F. 2d 776, 779 (C.A. 2d)—

> The purpose of subdivision 14 was to tax all business income, however destined, unless the company was really not in busines at all. * * *

Also, in *Gagne* v. *Hanover Water Works Co., supra,* in which a corporation claimed exemption under subdivision (14), the court there, in denying exemption, explained (p. 661):

> The statute exempts only those corporations organized (incorporated) for the exclusive purpose of holding title to property, collecting income therefrom, and turning the entire amount thereof, less expenses, to an organization which is itself exempt * * *. The powers granted by its [taxpayer's] charter and the acts done under them disclose that

> it was authorized to engage and engaged in business activities like any domestic business corporation operating a water works plant for profit. It surely was not organized for the exclusive purpose of holding title to property and in fact it did not limit its activities to such purpose.

Thus the taxpayer in that case, like the taxpayer here, was not only authorized to engage but was engaged in regular business activities yet it claimed exemption because its earnings would go to Dartmouth College and the Village of Hanover. However its claim was not allowed.

That Congress did not intend to exempt a business corporation from tax merely because its net income is distributable to a tax exempt organization is also confirmed by Code Section 23 (q)(2) (Appendix A, *infra*) which limits allowable deductions by a corporation on account of contributions to organizations described in Section 101 (6) to an amount not exceeding 5 per cent of its net income. This section too would become meaningless if, as taxpayer argues, the entire net income of a business corporation escapes tax merely because the income is destined for tax exempt organizations.

C. Decisions Involving a Claim to Tax Exemption Under Section 101 of the Internal Revenue Code.

Taxpayer asserts (Br. 20) that "A majority of jurisdictions" considering the question here have held "that the destination of the income is more significant than its source". Also in this connection taxpayer

implies (Br. 21) that such cases as *C. F. Mueller Co.* v. *Commissioner,* 190 F. 2d 120 (C.A. 3d), and *Sico Co.* v. *United States,* 102 F. Supp. 197 (C. Cls.) (in which exemption was allowed), announced "the general rule" and that this Court indicated its agreement with the alleged rule in *Squire* v. *Students Book Corp.,* 191 F. 2d 1018, "although it did not expressly so hold in that case". We must take issue with the taxpayer that there is a "general rule" supporting taxpayer's contention here or that this Court has indicated that it approves the decision in the *Mueller* case which taxpayer cites as setting forth the views of the majority.

In the *Squire* case it was held that an incorporated book store which was owned by Washington State College and whose earnings were entirely devoted to the purposes of that institution was exempt under Section 101 (6) of the Internal Revenue Code. In discussing the issue before it, this Court did make the statement that most of the circuits confronted with the issue here appear to have applied the ultimate destination test in determining the question of exemption but the Court then stated in conclusion (p. 1020):

> *Resolution of the case before us does not depend wholly on the ultimate destination of the taxpayer's profits.* The business enterprise in which taxpayer is engaged obviously bears a close and intimate relationship to the functioning of the College itself. (Italics supplied.)

Thus it is evident that this Court was of the opinion that the book store there was organized and operated

to aid the college in its educational projects. Consequently the *Squire* case is distinguishable in that respect from the instant case, and we do not consider that case as determining what should be done in a case like the instant one where the taxpayer is not engaged in an educational or other approved enterprise. We are supported in our opinion that the question is still an open one by this Court's statement in the *Squire* case that it had made "no definite pronouncement on the subject". (P. 1020.)

It is true, as this Court pointed out in the *Squire* case, that opposite conclusions have been reached in the *Community Service* case, *supra,* and the *Mueller* case and that varying views have been expresed in other cases and that this has led to some confusion. Upon examination of these cases, it will be seen that most of them rely on the leading case of *Trinidad* v. *Sagrada Orden,* 263 U. S. 578, and we call special attention to that case here because the Supreme Court's opinion therein appears to be the basis for the view that destination rather than source of income should be the test in cases like the instant one, but we do not think such a conclusion is warranted when the opinion is correctly interpreted.

In the *Sagrada Orden* case, a religious organization that was otherwise tax exempt undertook as a minor part of its activities to sell wine and chocolate to its member churches, from which activities it received a trivial amount of income. The Government took the position that these activities deprived the organization of its tax exempt status, because it was not "operated exclusively" for religious purposes. In holding that

the organization did not lose its exemption, the Supreme Court in its opinion (p. 581) used language suggesting that the exemption depended not upon the "source of income", but rather upon its "destination". However the Court noted (p. 581) that such "limited trading, if it can be called such, is purely incidental to the pursuit of those [religious] purposes, and is in no sense a distinct or external venture". The crux of its opinion is to be found in the following language (p. 582):

> As respects the transactions in wine, chocolate and other articles, we think they *do not amount to engaging in trade in any proper sense of the term. It is not claimed that there is any selling to the public or in competition with others.* The articles are merely bought and supplied for use within the plaintiff's own organization and agencies—some of them for strictly religious use, and the others for uses which are purely incidental to the work which the plaintiff is carrying on. That the transactions yield some profit is in the circumstances a negligible factor. *Financial gain is not the end to which they are directed.* (Italics supplied.)

The plain implication of the Supreme Court's decision in the *Sagrada Orden* case (and its later decision in the *Better Business Bureau* case, *supra*) is that a corporation "selling to the public or in competition with others" for "financial gain" is not within the exempt class, even though it also performs tax exempt activities.

Certainly those who rely on the *Sagrada Orden* case must not be allowed to overlook the fact that the taxpayer there was not a business corporation and that the Government had conceded that it had been both organized and operated for religious purposes. Obviously whatever else may be said about that case, it was those significant facts which are the basic reasons for the decision. But in many of the subsequent cases involving Section 101 (6) the claimants have not been in a position to make such a showing or anything comparable to it. Furthermore, it will be seen, although some courts have referred to the ultimate destination of the income, there have often been other factors which support taxpayer's claim to exemption. Actually there are only four cases which even appear to allow exemption solely because of the ultimate destination of its income. These cases are *Roche's Beach, Inc.* v. *Commissioners, supra; Willingham* v. *Home Oil Mill*, 181 F. 2d 9 (C.A. 5th), certiorari denied, 340 U. S. 852; *C. F. Mueller Co.* v. *Commissioner, supra;* and *Sico Co.* v. *United States, supra.* Moreover, as we shall show below, the first two cases named do not actually make destination the sole test for exemption.

All of the four cases just referred to misinterpret and misapply the *Sagrada Orden* case and are essentially in conflict with this Court's decision in *Bear Gulch Water Co.* v. *Commissioner, supra*, and with the following: *Stanford University Book Store* v. *Helvering*, 83 F. 2d 710 (C.A.D.C.); *Universal Oil Products Co.* v. *Campbell*, 181 F. 2d 451 (C.A. 7th), certiorari denied, 340 U. S. 850; *United States* v. *Community Services, supra*; cf. *Gagne* v. *Hanover Water Works Co., supra.*

The four decisions are also in conflict with decisions holding that even an organization which itself carries on a charitable or other approved activity is not exempt if it has an additional purpose which is not charitable. See, e.g., *Better Business Bureau* v. *United States,* 326 U. S. 279; *Smyth* v. *California State Automobile Ass'n,* 175 F. 2d 752 (C.A. 9th), certiorari denied, 338 U. S. 905; *Chattanooga Auto. Club* v. *Commissioner,* 182 F. 2d 551 (C.A. 6th).

In *Roche's Beach, Inc.* v. *Commissioner, supra,* the taxpayer was a corporation organized as the medium through which a wholly-exempt charitable foundation was to operate and the will of the testator who provided for such corporation stated that all of the income therefrom must be used for charitable purposes. A somewhat similar situation existed in the *Home Oil Mill* case and, in granting exemption, the court stated there that (p. 10)—

> If it is possible for a religious, charitable, and educational trust to operate an industry through a corporate agency, and be exempt under Section 101 (6) of Title 26 U.S.C.A., the appellant is entitled to such exemption.

Consequently it is obvious that in the cases of *Roche's Beach* and *Home Oil Mill* the decisions resulted in large part from the fact that in each instance the corporation involved, although a separate entity, was intended to be and was an operating medium for an exempt organization which owned all its stock. What the courts there really did was to consider a charitable trust and its operating medium as one, attributing to

the operating medium the functional charitable purposes of the exempt charitable trust. This Court apparently did the same thing in *Squire* v. *Students Book Corp., supra,* where there was some factual basis for doing so.

Conversely, exemption has been denied because of the lack of such a relationship. *Stanford University Book Store* v. *Helvering, supra,* involved a cooperative association organized for the purpose of carrying on a general mercantile business for the accommodation of the students and faculty of Leland Stanford Junior University. The Court of Appeals for the District of Columbia there stated (p. 712):

> We think that the record conclusively shows that the association is not "a corporation organized and operated exclusively for educational purposes." It must be remembered that the association is not, in contemplation of law, a division or part of the university. The university as such does not own any interest in the association, is not responsible for its debts, is not entitled to any part of its earnings, and takes no part in conducting and managing its affairs. The two institutions are separate legal entities and *therefore the attributes of the university cannot be attributed to the association,* nor can the latter claim to be an educational institution * * *. (Italics supplied.)

In the present case, as in the case just cited, there is no basis for attributing functional religious, charitable or educational purposes to the taxpayer. There is no relationship between the taxpayer and any exempt

organization or between the taxpayer's activities and those of any exempt organization. All we have is a corporation whose profits are ultimately to be distributed to such organization as taxpayer's officers decide and it is within their discretion whether they distribute anything. Thus no specific organization has a right to receive any portion of the taxpayer's income at any time.

Thus, so far as we are aware, the *Mueller* and *Sico Co.* cases are the only ones which hold that an organization is entitled to exemption solely because of the ultimate destination of its profits. In neither of those cases was the organization involved an operating medium of an exempt organization through stock ownership or otherwise (although *Mueller* was later to become one). Thus there was no basis for attributing functional charitable activities to the organizations therein but, as we have pointed out, a functional charitable activity is a condition to exemption under Section 101 (6). Certainly that is the meaning of the first requirement therein, namely, that the taxpayer claiming exemption must be "organized and operated exclusively" for religious, educational or charitable purposes. See *United States* v. *Community Services, supra; Bear Gulch Water Co.* v. *Commissioner, supra; Universal Oil Products Co.* v. *Campbell, supra;* cf. *Gagne* v. *Hanover Water Works, supra; Sun-Herald Corp.* v. *Duggan,* 160 F. 2d 475 (C.A. 2d).

It should be noted also that most of the cases cited in the *Mueller* opinion were cases in which the taxpayer-organization was *itself* engaged in a functional charitable activity. See *Debs Memorial Radio Fund* v.

Commissioner, 148 F. 2d 948 (C.A. 2d); *Bohemian Gymnastic Ass'n Sokol of City of N. Y.* v. *Higgins,* 147 F. 2d 774 (C.A. 2d); *Commissioner* v. *Orton,* 173 F. 2d 483 (C.A. 6th); *Commissioner* v. *Battle Creek,* 126 F. 2d 405 (C.A. 5th). In all of those cases except *Debs Memorial Radio Fund* the taxpayer's commercial activity was incidental to its charitable activity, as in the *Sagrada Orden case. In Debs Memorial Radio Fund* the commercial activity, consisting of accepting radio advertising, was not merely incidental to the taxpayer's charitable activity but on the other hand was related to it and was necessary.

D. Legislative History

We submit that the language of Section 101 (6) is so clear that there is no need to refer to the legislative history. However, as taxpayer has done so, we shall also comment on it. Taxpayer asserts (Br. 27-28) that the early legislative history of this section indicates that a corporation organized for profit can be exempt provided (1) that it is not organized for individual profit and (2) that all the profits are devoted to religious, charitable or educational purposes. We cannot agree, particularly as it is clear that by such statement taxpayer means for us to infer that Congress intended to include ordinary business organizations if they devote their income to religious, charitable or educational institutions. It should be noted here that that portion of the proposed amendment to the 1909 Act to which taxpayer refers (Br. 23-27), and which used the language "all the profit of which is in good faith devoted" to the approved purposes, was omitted

from the final enactment. Nevertheless the omitted language appears to be what taxpayer is relying on. It cannot properly do so of course, but even if that language had been left in the law, taxpayer's interpretation would still be wrong.

Furthermore it is apparent, from the Senate debate from which the taxpayer quotes, that in considering tax exemption, the Senators had in mind organizations which actually had a religious, charitable or educational function to perform such as the Methodist Publishing Company referred to. (Br. 25.) Trinity Church of New York was another institution mentioned in the same debate, although taxpayer does not point that out. In view of these examples discussed by the Senators and of their failure to refer to ordinary businesses which might distribute profits to charitable or other approved institutions, we think it is evident that Congress did not mean to include such organizations as the taxpayer here.

The Committee Reports are silent on the particular provision involved here until 1935. In that year the legislative intent with respect to Section 101 (6) was affirmatively reflected when the language of Section 101 (6) was adopted in Section 811 (b)(8) of the Social Security Act, c. 531, 49 Stat. 620. The Committee Reports accompanying that Act state (H. Rep. No. 615, 74th Cong., 1st Sess., p. 33 (1939-2 Cum. Bull. 600, 607); S. Rep. No. 628, 74th Cong., 1st Sess. p. 54 (1939-2 Cum. Bull. 611, 621)):

> The organizations which will be exempt from such taxes are churches, schools, colleges, and other

educational institutions not operated for private profit, the Y.M.C.A., the Y.W.C.A., the Y.M.H.A., the Salvation Army, and other organizations which are exempt from income tax under Section 101 (6) of the Revenue Act of 1932.

The provisions added by the Revenue Act of 1950, c. 994, 64 Stat. 906, also clearly reflect the Congressional intent and understanding that Section 101 (6) does not exempt an organization to which a functional charitable activity cannot even be attributed. For pertinent portions of such provisions see Appendix A, *infra.* We are aware that our taxable periods are prior to 1950 but we refer to the 1950 Act because subsequent legislation may be considered to aid in the interpretation of prior legislation. See *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 277; *Brewster* v. *Gage,* 280 U. S. 327, 337. Moreover it has been specifically held in *United States* v. *Community Services, supra,* that the provisions of the 1950 Act just referred to did not change the existing law but were merely clarifying.

The provisions of the 1950 Revenue Act implementing Code Section 101 represent the response of the Congress to the recommendations of the President and the Treasury. Section 301 (a) of the Act (Appendix A, *infra*) subjects to tax any "unrelated business net income", and subsection (b) (Appendix A, *infra*) taxes "Feeder Organizations".

The House Ways and Means Committee Report states that the provision taxing the unrelated business net income of organizations which otherwise meet the requirements of Section 101 (6) is aimed at "unfair

competition". H. Rep. No. 2319, 81st Cong., 2d Sess., pp. 36-37 (1950-2 Cum. Bull. 380, 408-409). Significantly, with respect to "Feeder Organizations", i.e., those whose earnings are payable to tax exempt organizations, the Report states (pp. 41-42, 124 (1950 Cum. Bull. 412, 469)):

> Section 301 (b) of your committee's bill provides that no organization operated primarily for the purpose of carrying on a trade or business (other than the rental of real estate) for profit shall be exempted under section 101 merely on the grounds that all of its profits are payable to one or more organizations exempt from tax under this section.
> * * *
>
> The effect of this amendment is to prevent the exemption of a trade or business organization under section 101 on the grounds that an organization actually described in section 101 receives the earnings from the operations of the trade or business organization. *In any case it appears clear to your committee that such an organization is not itself carrying out an exempt purpose.* Moreover, it obviously is in direct competition with other taxable businesses. This amendment applies only with respect to taxable years beginning after December 31, 1950. No implications should be drawn from it as to the present tax status of such organizations.

* * * * *

> The determination of the tax treatment of such feeder organizations for taxable years beginning prior to January 1, 1951, is to be made as if this subsection of the bill had not been enacted and *without inference drawn from the fact that the amendment made by this subsection of the Bill is not expressly made applicable to such taxable years.* In the area covered by this amendment there has been litigation as to the application of such a rule under existing law (cf. *Roche's Beach, Inc.* v. *Commissioner* (C.C.A. 2, 1938), 96 F. (2d) 776; *Universal Oil Products Co.* v. *Campbell* (C.A. 7, 1950), 181 F. (2d) 451; *Willingham* v. *Home Oil Mill* (C.A. 5, 1950), 181 F. (2d) 9; *C. F. Mueller Co.,* 14 T.C. No. 111-½ (May 25, 1950). *The amendment is intended to show clearly what, from its effective date, the rule is to be,* without disturbing the determination in present litigation of the rule of existing law. (Italics supplied.)

See also S. Rep. No. 2375, 81st Cong., 2d Sess., pp. 35-36 (1950-2 Cum. Bull. 483, 509).

Thus it is plain from the provisions of the 1950 Revenue Act and the Committee Reports that, in expressly providing that business organizations are not exempt because their profits are payable to an exempt organization, Congress was clarifying and not changing the law; and that it undertook such clarification because of litigation in this area. The statements in the Report that "In any case it appears clear to your committee that such an organization is not itself carrying out an exempt purpose", and that the amendment "is

intended to show clearly'' what the rule is to be, effectively repudiate the construction of the statute contended for by the taxpayer here.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

H. Brian Holland,
Assistant Attorney General.

Ellis N. Slack,
Louise Foster,
Special Assistants to the Attorney General.

February, 1954.

APPENDIX A

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(q) [as amended by Sec. 125 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 114 of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Charitable and Other Contributions by Corporations.*—In the case of a corporation, contributions or gifts payment of which is made within the taxable year to or for the use of:

* * * * *

(2) A corporation, trust, or community chest fund, or foundation, created or organized in the United States or in any possession thereof or under the law of the United States, or of any State or Territory, or of the District of Columbia, or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, veteran rehabilitation service, literary, or educational purposes or for the prevention of cruelty to children * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation; or

* * * * *

to an amount which does not exceed 5 percentum of the taxpayer's net income as computed without benefit of this subsection. * * *

* * * *

SEC. 54. RECORDS AND SPECIAL RETURNS.

* * * * *

(f) [as added by Sec. 117 of the Revenue Act of 1943, *supra*] Every organization, except as hereinafter provided, exempt from taxation under section 101 shall file an annual return, which shall contain or be verified by a written declaration that it is made under the penalties of perjury, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe, and shall keep such records, render under oath such statements, make such other returns, and comply with such rules and regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe. No such annual return need be filed under this subsection by any organization exempt from taxation under the provisions of section 101—

(1) which is a religious organization exempt under section 101 (6); or

* * * * *

(4) which is an organization exempt under section 101 (6), if such organization is operated, supervised, or controlled by or in connection with a religious organization described in paragraph (1); or

* * * * *

(26 U.S.C. 1946 ed., Sec. 54.)

SEC. 101. EXEMPTIONS FROM TAX ON CORPORATIONS.

The following organizations shall be exempt from taxation under this chapter—

* * * * *

(6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise atempting, to influence legislation;

* * * * *

(14) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this chapter;

* * * * *

(26 U.S.C. 1946 ed., Sec. 101.)

Revenue Act of 1950, c. 994, 64 Stat. 906:

SEC. 301. INCOME OF EDUCATIONAL, CHARITABLE, AND CERTAIN OTHER EXEMPT ORGANIZATIONS.

(a) *Tax on Certain Types of Income.*—Supplement U of chapter 1 is hereby amended to read as follows:

"SUPPLEMENT U—TAXATION OF BUSINESS INCOME OF CERTAIN SECTION 101 ORGANIZATIONS

"SEC. 421. IMPOSITION OF TAX.

"(a) *In General.*—There shall be levied, collected, and paid for each taxable year begining after December 31, 1950—

"(1) upon the supplement U net income (as defined in subsection (c)) of every organization described in subsection (b)(1), a normal tax of 25 per centum of the supplement U net income, and a surtax of 20 per centum of the amount of the supplement U net income in excess of $25,000.

* * * * *

"(b) *Organizations Subject to Tax.*—

"(1) *Organizations taxable as corporations.*—The taxes imposed by subsection (a)(1) shall apply in the case of any organization (other than a church, a convention or association of churches, or a trust described in paragraph (2)) which is exempt, except as provided in this supplement, from taxation under this chapter by reason of paragraph (1), (6), or (7) of section 101. Such taxes shall also apply in the case of a corporation described in section 101 (14) if the income is payable to an organization which itself is subject to the tax imposed by subsection (a) or to a church or to a convention or association of churches.

* * * * *

"(c) *Definition of Supplement U Net Income.*—The term 'supplement U net income' of an organiza-

tion means the amount by which its unrelated business net income (as defined in section 422) exceeds $1,000.

* * * * *

"SEC. 422. UNRELATED BUSINESS NET INCOME.

"(a) *Definition.*—The term 'unrelated business net income' means the gross income derived by any organization from any unrelated trade or business (as defined in subsection (b)) regularly carried on by it, less the deductions allowed by section 23 which are directly connected with the carrying on of such trade or business, subject to the following exceptions, additions, and limitations:

* * * * *

"(b) *Unrelated Trade or Business.*—The term 'unrelated trade or business' means, in the case of any organization subject to the tax imposed by section 421 (a), any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 101, * * *

* * * * *

The term 'unrelated trade or business' means, in the case of a trust computing its unrelated business net income under this section for the purposes of section 162 (g)(1), any trade or business regularly carried

on by such trust or by a partnership of which it is a member.

* * * * *

(b) *Feeder Organizations.*—Section 101 is hereby amended by adding at the end thereof the following paragraph:

"An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt under any paragraph of this section on the ground that all of its profits are payable to one or more organizations exempt under this section from taxation. For the purposes of this paragraph the term 'trade or business' shall not include the rental by an organization of its real property (including personal property leased with the real property)."

* * * * *

(26 U.S.C. 1946 ed., Supp. IV, Secs. 101, 421-422.)

SEC. 302. EXEMPTION OF CERTAIN ORGANIZATIONS FOR PAST YEARS.

(a) *Trade or Business Not Unrelated.*—For any taxable year beginning prior to January 1, 1951, no organization shall be denied exemption under paragraph (1), (6), or (7) of section 101 of the Internal Revenue Code on the grounds that it is carrying on a trade or business for profit if the income from such trade or business would not be taxable as unrelated business income under the provisions of Supplement U of the Internal Revenue Code, as amended by this Act, or if such trade or business is the rental

by such organization of its real property (including personal property leased with the real property).

* * * * *

SEC. 303. EFFECTIVE DATE OF PART I.

The amendments made by this part shall be applicable only with respect to taxable years beginning after December 31, 1950. The determination as to whether an organization is exempt under section 101 of the Internal Revenue Code from taxation for any taxable year beginning before January 1, 1951, shall be made as if section 301 (b) of this Act had not been enacted and without inferences drawn from the fact that the amendment made by such section is not expressly made applicable with respect to taxable years beginning before January 1, 1951.

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.101(6)-1. *Religious, Charitable, Scientific, Literary, and Educational Organizations and Community Chests.*—In order to be exempt under section 101(6), the organization must meet three tests:

(1) It must be organized and operated exclusively for one or more of the specified purposes;

(2) Its net income must not inure in whole or in part to the benefit of private shareholders or individuals; and

(3) It must not by any substantial part of its activities attempt to influence legislation by propaganda or otherwise.

Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor. The fact that a corporation established for the relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily deprive it of exemption.

* * * * *

Since a corporation to be exempt under section 101(6) must be organized and operated exclusively for one or more of the specified purposes, an organization which has certain religious purposes and which also manufactures and sells articles to the public for profit, is not exempt under section 101(6) even though its property is held in common and its profits do not inure to the benefit of individual members of the organization. * * *

APPENDIX B

Excerpts from Petitioner's Exhibit 8

ARTICLES OF INCORPORATION

of

RALPH H. EATON FOUNDATION

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned, have this day associated ourselves together for the purpose of forming a corporation under and pursuant to the laws of the State of Arizona for purposes other than pecuniary

profit, and do hereby adopt Articles of Incorporation as follows;

ARTICLE I

The name of the corporation shall be:

RALPH H. EATON FOUNDATION

The names and post office addresses of the incorporators and original members are:

Names	Addresses
Ralph H. Eaton	Phoenix, Arizona
Frances M. Eaton	Phoenix, Arizona
Thomas H. Kent, Jr.	Phoenix, Arizona

ARTICLE II

The principal place within the State of Arizona at which the business of the corporation is to be transacted is in the City of Phoenix, County of Maricopa, State of Arizona, at which place the meetings of incorporators and members may be held. The corporation may have such other offices, either within or without the State of Arizona, as may from time to time be established by the Board of Directors and meetings of the Board of Directors may be held at any time or place.

ARTICLE III

The general nature of the business proposed to be transacted is as follows:

1. To foster and promote Christian, religious, charitable and educational enterprises.

2. To acquire by purchase, gift, devise, bequest, transfer, assignment or otherwise, and to buy, sell, deal in, receive, exchange, own, hold, rent, lease, grant, transfer, assign, convey, mortgage, encumber, deed in trust, pledge, hypothecate, give, alien, dispose of, manage, and control real and personal property of every kind and description as in connection with the purposes of this corporation and the promotion, maintenance, support and operation thereof may be expedient or necessary; to incur indebtedness and to execute and deliver written evidences thereof; to contract in the same manner and to the same extent as a natural person; to sue and to be sued and to defend in all courts and all places in all matters and proceedings whatsoever.

3. This corporation is one which does not contemplate pecuniary gain or profit to the members thereof and shall have no capital stock. It is empowered to purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of, or any bonds, securities, or evidences of indebtedness created by any other corporation or corporations of the State of Arizona or any other state or government and while the owner of such shares of stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

To borrow money; to issue bonds, debentures or obligations of this corporation from time to

time for money borrowed or otherwise for the purposes and in the manner provided by law; and to secure the same by mortgage, pledge, deed of trust or otherwise.

The foregoing clauses shall be construed as both purposes and powers, and the enumeration of specific purposes and powers shall not be construed to limit or restrict in any manner the meaning of general terms or the general powers of the corporation, which is organized for the purpose of fostering and promoting by furnishing funds for contributing to and endowing Christian, religious, charitable and educational enterprises.

ARTICLE IV

[Omitted because it appears in the record, p. 30]

ARTICLE V

The time of the commencement of this corporation shall be the date of the filing of these articles of incorporation with the Arizona Corporation Commission and the recordation of certified copies thereof in the offices of the County Recorder of Maricopa County, Arizona, and it shall terminate twenty-five (25) years thereafter, unless it be renewed in manner provided by law.

ARTICLE VI

New members may be admitted to this corporation by a majority vote of the members and the

affairs of the corporation shall be conducted by a Board of Directors of not less than three (3) members nor more than seven (7) members as shall be determined by the by-laws of the corporation.

Article VII

The Board of Directors shall have authority among other things to make and alter the by-laws of this corporation.

Article VIII

The private property of the members and officers of this corporation shall be exempt from all corporate debts of any kind whatsoever.

Article IX

This corporation reserves the right to amend, alter, change or repeal any provision contained in these articles of incorporation in the manner now or hereafter prescribed by statute, and all rights conferred upon members herein are granted subject to this reservation.

Article X

The highest amount of indebtedness or liability, direct or contingent, to which the corporation shall at any time subject itself shall be limited only by an amount calculated in accordance with any rules or regulations promulgated by the Arizona Corporation Commission in compliance with the law of this state affecting non-profit corporations.

Article XI

The members of this corporation are:

Ralph H. Eaton
Frances M. Eaton
Thomas H. Kent, Jr.

New members may be admitted by a majority vote of the members at a meeting called for that purpose.

Ralph H. Eaton, Frances M. Eaton, and Thomas H. Kent, Jr. were elected directors of the said corporation at a meeting held at 403 1st Natl Bank Bldg., Phoenix, Arizona, on the 10th day of March, 1947.

The term of office of the director, Ralph H. Eaton, shall be for the duration of his natural life or until his resignation or incapacity to act. The term of office of the director, Frances M. Eaton, shall be for the duration of her natural life or until her resignation or incapacity to act. The term of office for any other director shall be for the period of two (2) years.

Directors of the corporation shall be elected at the annual meeting of the members of the corporation on the 1st Monday of February in each year beginning in the year 1948.

Article XII

This corporation shall have no members other than its directors, and the authorized number of such directors, subject to change at any time by a change in the by-laws, is three (3).

1. Each director shall serve until his successor is elected and qualified, or until his term of office is terminated as herein provided.

2. No person shall be elected or chosen as a director of this corporation unless and until he shall, before being so elected, in writing, same to be filed with and become a part of the records of this corporation, declare himself to have a heart-conviction, without any equivocation or mental reservation whatsoever, of the trugh [*sic*] of each and all of the statements contained in and composing the Doctrinal Statement contained in Article IV hereof. At or immediately before each annual meeting of the corporation, each director shall, in writing, same to be filed with and become a part of the records of this corporation, declare himself to have a heart-conviction, without any equivocation or mental reservation whatsoever, of the truth of each and all of the statements contained in and composing the Doctrinal Statement contained in Article IV hereof. Failure or refusal or neglect of any director so to do shall ipso facto forfeit his right to be or become or remain as such director; and by reason thereof his office as such director shall ipso facto and instanter be and become vacant.

Any director, who, upon the written request of a majority of the other directors to him delivered, shall, within ten (10) days from the receipt of such written request, fail or refuse or neglect to, in writing, same to be filed with and become a part of the records of this corporation, declare himself to have

a heart-conviction, without any equivocation or mental reservation whatsoever, of the truth of each and all the statements contained in and composing the Doctrinal Statement contained in Article IV hereof, shall ipso facto and instanter forfeit his right to be or become or remain as such director; and by reason thereof his office as such director shall ipso facto and instanter become vacant.

Article XIII

The Board of Directors shall regulate, govern and control all and singular the business affairs of this corporation.

In Witness Whereof, we, the undersigned, have made and executed the above articles of incorporation and subscribed our names hereto this 12th day of March, 1947.

(Signed) Ralph H. Eaton
Francis M. Eaton
Thomas H. Kent, Jr.

☆U. S. GOVERNMENT PRINTING OFFICE 1954—289441/P.O. 953

No. 14047.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH H. EATON FOUNDATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of Decision of the Tax Court of the United States.

REPLY BRIEF FOR THE PETITIONER.

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---

1. Analysis of Respondent's Argument.

Respondent seemingly has three main points: (1) that it is necessary for an organization to be organized and operated exclusively for a religious, charitable or educational purpose for exemption under I. R. C. §101(6), and that it cannot qualify for such exemption if it fulfills that purpose by engaging in commercial enterprises; (2) that I. R. C. §101(6) must be read in the light of I. R. C. §101(14) and that such a reading supports the above; and (3) that there is no majority rule to the effect that the ultimate destination of the income of an organization is more significant than its source in determining an exempt status.

The separation of these points into three arguments presupposes an independence of each from the other. Respondent, however, intimates that this might not be entirely true when he states (Br. 13, 14):

> "* * * some courts have held that a claim to exemption is to be determined entirely by the ultimate destination of the claimant's income. That is of course merely another way of saying * * * that a corporation will be treated as if it were organized and operated for the required statutory purpose if its income is to be used for such purpose. Obviously that is not what the statute says and we cannot believe that Congress meant for the first requirement [of being organized and operated 'exclusively' for the required statutory purpose] of Section 101(6) to be watered down and made meaningless in that way."

Petitioner submits that, despite Respondent's belief to the contrary, a majority of the courts considering the problem do in fact treat a corporation as organized and operated "exclusively" for the required statutory purpose where its income is destined for such purpose, regardless of the manner in which such income is acquired. Since the "ultimate destination" test is, under the applicable law, merely another way of stating the "organized" and "operated" requirements of §101(6), it becomes apparent that Respondent's first argument blends into his third. It therefore will be with that latter argument, and with Respondent's second argument, that this Reply Brief will deal.

Petitioner wishes to make clear, of course, that there are additional criteria of §101(6) which are to be met, in addition to the "organized" and "operated" requirements. Since Petitioner's opening brief dwelt at length on the manner in which Petitioner met those other criteria, no further mention thereof will be made in this brief.

2. Petitioner's Contention Is Consistent With I. R. C., §101(14).

Respondent argues that if I. R. C. §101(14) is to have any meaning, §101(6) cannot apply to so-called "feeder corporations," that is, to corporations engaged in ordinary business activities whose earnings are destined for exempt organizations. Respondent cites a number of authorities to support his argument, but most of them are of no assistance to him.

Thus, *Bear Gulch Water Co. v. Com'r,* 116 F. 2d 975 (C. A. 9th), cited by Respondent, involved a corporation organized for business purposes whose ownership was taken over by an exempt corporation. The holding of the case was that the change in ownership did not cause the taxpayer to become exempt under §101(6), and there was no discussion of §101(14). In *Gagne v. Hanover Water Works Co.,* 92 F. 2d 659 (C. A. 1st), a water company owned by an exempt corporation was held not exempt under a section similar to §101(14) on the ground that the water company operated a business and did more than merely hold title. §101(6) was not involved in the *Gagne* case and no argument was made attempting to invoke the "feeder corporation" principle. Respondent also cited *Universal Oil Products Co. v. Campbell,* 181 F. 2d 451 (C. A. 7th), cert. den. 340 U. S. 850. In that case a corporation originally organized for profit was acquired by an exempt corporation and the holding was that the taxpayer had not been "organized" for the purposes required under §101(6), an undeniably sound conclusion. The case did not discuss §101(14) at all.

The only case cited by Respondent which supports his argument that, because of the existence of §101(14), "feeder corporations" cannot be included within the scope of §101(6) is the case of *United States v. Community Services, Inc.,* 189 F. 2d 421 (C. A. 4th), cert. den. 342

U. S. 932. We frankly admit that this case supports Respondent's conclusion. However, as has already been noted in our opening brief, and as will be further mentioned herein, the *Community Services* case happens to represent a distinctly minority view in all respects.

Petitioner has been able to discover only two other leading cases which discuss the interplay of §§101(6) and 101(14). The first of these is the famous *Roche's Beach, Inc. v. Commissioner,* 96 F. 2d 776 (C. A. 2nd). In that case the court stated (p. 779):

> "Subdivision 14 relates to corporations which hold title and collect income for any tax exempt organization, and such organizations include many which are not embraced within subdivision 6. Hence, the fact that subdivision 14, as we have construed it, does not include corporations which operate a business, should not lead to the conclusion that subdivision 6, which does refer to operating corporations, includes only those which directly dispense their funds for the limited purposes there stated. No reason is apparent to us why Congress should wish to deny exemption to a corporation organized and operated exclusively to feed a charitable purpose when it undoubtedly grants it if the corporation itself administers the charity. We think the language is adequate to describe both types."

The second case squarely discussing this question is the Tax Court opinion in *C. F. Mueller Co.,* 14 T. C. 922. There the majority of the court fully discussed the relationship of §§101(6) and 101(14) and its conclusion was in line with that now advocated by Respondent. The dissenting opinion also discussed this point and stated:

> "It appears to be conceded that the *Roche's Beach* case is indistinguishable from the one now before us. The suggestion that the statutory scheme envisages exemption only under section 101(14) is not new or different from that made and discarded twelve years ago in the *Roche's Beach* case and since then in all the cases which have followed it."

It is to be recalled that the conclusion reached by the dissenting judge was supported when the case was decided on appeal (190 F. 2d 120 (C. A. 3rd)), although the Third Circuit opinion did not choose to mention the point now under discussion.

Thus, of the three cases discussing the question, two support Petitioner's position and only one supports Respondent, and that one represents in its entirety a minority view. Under this state of affairs, the best that can be said for Respondent's argument is that §101 is ambiguous in the manner in which it relates certain of its internal subsections. The authorities would appear to support the conclusion that in such a case, the ambiguity is to be resolved against taxation. (*C. F. Mueller Co. v. Com'r,* 190 F. 2d 120 (C. A. 2nd); *Helvering v. Bliss,* 293 U. S. 144, 150; *Old Colony Trust Co. v. Helvering,* 301 U. S. 379, 384.)

3. The Majority Rule Adopts the "Ultimate Destination" Test.

The statement was made in Petitioner's opening brief that a "majority of jurisdictions" considering the question have held and established the "general rule" that the destination of the income is more significant than its source in determining exemption under §101(6). Respondent flatly takes issue with Petitoner's statement, and this he does despite the language of this very Court in *Squire v. Student Book Corp.,* 191 F. 2d 1018, wherein the Court referred to the "ultimate destination" test as the "general rule," and declared:

> "Since the decision of the second circuit in *Roche's Beach, Inc. v. Commissioner,* 96 F. 2d 776, most of the circuits confronted with the problem appear to have applied the 'ultimate destination' test in determining whether the profits of a commercial enterprise are exempt under §101(6), or, to put the matter

> another way, if the only purpose of the enterprise is to devote its profits to charitable or educational ends the exemption has been usually held to attach."

Petitioner is of the view that this Court was correct in its interpretation of the cases.

Since so much of Respondent's argument is predicated upon the attempt to show that there is no majority view or "general rule" on this phase of the matter, it becomes important for us to analyze Respondent's argument in some detail.

Respondent first argues (Br. 28) that there are only four cases which appear to support the "ultimate destination" test, and Respondent cites *Roche's Beach, Inc. v. Com'r, supra; Willingham v. Home Oil Mill,* 181 F. 2d 9 (C. A. 5th), cert. den. 340 U. S. 852; *C. F. Mueller Co. v. Com'r, supra;* and *Sico Co. v. United States,* 102 Fed. Supp. 197 (C. Cls.). While the numerical significance of the cases cited may not seem large, it happens that they represent the views of the Second, Third and Fifth Circuits and also the view of the Court of Claims. These views concide with broad language of the U. S. Supreme Court in *Trinidad v. Sagroda Orden de Predicadores,* 263 U. S. 578. Moreover, Respondent omitted referring to *Commissioner v. Orton Ceramic Foundation,* 173 F. 2d 483 (C. A. 6th), wherein the Sixth Circuit joined the other jurisdictions above enumerated. In the *Orton* case, the Court stated:

> "We think that the Commissioner's contention that the taxpayer was engaged in an active, competitive business for profit and that therefore the enterprise could not be considered as exclusively one for scientific or educational purposes is answered by the opinion in *Trinidad v. Sagrada Orden de Predicadores,* 263 U. S. 578, wherein the statute was construed."

Attempting to show that the four cases which he cited did not represent the majority view, Respondent suggests

that these cases are in conflict with a number of other cases. These other cases and their obvious points of distinction with respect to the majority rule are as follows:

Bear Gulch Water Co. v. Com'r, supra: here an exempt corporation acquired all of the stock of a corporation originally organized for profit; no exempt status was found, nor was there any discussion of the rule under consideration.

Stanford University Book Store v. Helvering, 83 F. 2d 710 (C. A. D. C.): exemption was denied an association in part because its profits were distributed to private individuals; under these circumstances obviously no discussion of the rule in question was in order.

Universal Oil Products Co. v. Campbell, supra: here the Court was ready to assume for the sake of argument that "the dedication of the net earnings of a business corporation to an exempt purpose constitutes operation of the corporation for that purpose"; its decision turned upon another principle of law.

Gagne v. Hanover Waterworks Co., supra: this case was decided under §101(14) and did not discuss the "ultimate destination" rule.

The only case cited by Respondent which can be considered as truly in conflict with the cases from the Second, Third, Fifth and Sixth Circuits and from the Court of Claims is *United States v. Community Services, Inc., supra,* a fact which taxpayer readily confesses.

Respondent further contends, in support of his argument that the majority rule is not what this Court considers it to be, that the four cases are also in conflict with the cases of *Better Business Bureau v. United States,* 326 U. S. 279; *Smyth v. California State Automobile Assn.,* 175 F. 2d 752 (C. A. 9th), cert. den. 338 U. S. 905; and *Chattanooga Auto Club v. Com'r,* 182 F. 2d 551 (C. A.

6th). None of these additional cases cited by Respondent turn upon consideration of the "ultimate destination" rule, although it is interesting to note that this Court in *Squire v. Students Book Corp, supra,* cited the *Smyth* case as indicating approval of the "ultimate destination" test.

Petitioner thus submits that Respondent has produced nothing to disturb this Court's previous conclusion that the majority rule is that the destination of income is more significant than its source in the determination of an exempt status.

However, Respondent next attempts to weaken the authority of the four cases by undertaking to distinguish and set apart the *Roche's Beach* and *Home Oil Mill* decisions. For this purpose, Respondent argues (Br. 29, 30) that these decisions "resulted in large part" from the fact that the taxpayer, although a separate entity, "was intended to be and was an *operating medium* for an exempt corporation which owned all its stock." Exactly where Respondent finds authority for this "operating medium" concept is not clear, for so far as we can determine, this is the first case advancing such an argument. It is, of course, known that Respondent has argued, and petitioner concedes, that a taxpayer must be organized and operated exclusively for one or more of the statutory purposes. This new refinement to the argument is apparently that even if the taxpayer is organized and operated for business it will still be exempt if it is the "operating medium" of an exempt corporation. Such a rationale for the cases of *Roche's Beach* and *Home Oil Mill* is not only new and beyond the holding of those cases: it even appears to us to go so far as to undermine the holding of the principal case otherwise supporting Respondent's position. This case is, of course, the *Community Services* case. There, it will be recalled, the taxpayer was a non-stock membership corporation whose

charter provided that its purpose was to "receive donations of cash . . ., operate a canteen refreshment service and other business ventures for the convenience of the employees [of a certain company] . . ., and to conduct other business in order to earn profits, to the end that . . . all profits so earned . . . shall be devoted exclusively to religious, charitable, scientific, literary and/or educational purposes." The Fourth Circuit opinion upon which Respondent so heavily relies very clearly disposes of this "operating medium" concept with the following language:

> "For tax exemption purposes, the charitable nature of the distributees of its income cannot be attributed to the taxpayer . . . Otherwise a purely commercial corporation could claim the exemption, if all its stock were owned by an exempt corporation, which would receive, as dividends, all the net earnings of the commercial corporation. Clearly this is not the law."

The conclusion which the Fourth Circuit reached would, of course, have been exactly the opposite were the "operating medium" concept of Respondent adopted.

Petitioner, of course, submits that the *Community Services* case was decided incorrectly, but the point of this discussion is that the incorrectness does not stem from a misapplication of the "operating medium" concept contended for by Respondent, but rather from a refusal to recognize the majority view regarding the "ultimate destination" test.

Respondent, in his brief, even shows dissatisfaction with the authority of the two remaining cases with which Respondent admits himself to be still saddled. These cases are, of course, the *Mueller* case and the *Sico Co.* case. (It will be remembered that Respondent has not even referred to the *Orton Ceramic* case, *supra.*) These two cases Respondent considers to have been erroneously decided be-

cause in neither was the organization involved an "operating medium" of an exempt organization. Respondent contends that therefore there was no basis for attributing "functional charitable activities" to the organizations involved and, Respondent further argues, "a functional charitable activity is a condition to exemption under Section 101(6)" (Br. 31).

Petitioner submits that again Respondent has chosen to clothe the issues in this case with new and totally undefined language. Petitioner is at a loss to know the meaning of the term "functional charitable activity." From the context of Respondent's brief, it is gathered that this term is intended to apply only to organizations which are engaged in running a hospital or conducting school classes or other similar pursuits, and to exclude organizations which merely give money to other charitable organizations. If this is *not* what Respondent intends by the term, then Petitioner is at a loss to countervail Respondent's arguments. If, on the other hand, this conjecture as to Respondent's intention is accurate, then it is submitted that what Respondent is *really* arguing is that "feeder corporations" are not covered by §101(6). This argument is, of course, the classic one with which many of the cases herein discussed have concerned themselves. The issue under it is then reduced back to whether the majority view of the "ultimate destination" test is to be adopted, and excursions into uncharted semantic areas are thus avoided.

If this kind of approach is not adopted, one must then reckon with the additionally strange contention of Respondent (Br. 31, 32) that the cases cited by the *Mueller* case on appeal are to be explained on the ground that the commercial activity was only "incidental" or "related and necessary" to the charitable activity. It is submitted that there is something wrong with explanations of this type

when referred to such cases as *Debs Memorial Radio Fund v. Com'r,* 148 F. 2d 948 (C. A. 2nd), wherein the taxpayer operated a radio station, or to *Commissioner v. Orton Ceramic Foundation, supra,* wherein the taxpayer manufactured ceramic cones.

It is therefore Petitioner's conclusion that Respondent has taken a legal issue, namely, the "ultimate destination" test, with respect to which there is no dearth of authority, and, instead of facing the issue squarely, has attempted to distinguish the majority rule on the basis of concepts such as an "operating medium" or a "functional charitable activity"—concepts which the courts do not discuss and Respondent does not define.

It might be noted on this point that Respondent takes some solace for his position from the passage of Section 301 of the 1950 Revenue Act. By that Act, it will be recalled, "feeder corporations" are taxed on their unrelated business net income. Respondent states that these legislative provisions were merely a clarification of the existing law and did not change it, citing the *Community Services* case. While it is true that the *Community Services* case so held, this Court stated in *Squire v. Students Book Corp.* that the 1950 Revenue Act provisions "declared a *different rule* applicable for taxable years commencing December 31, 1950" [italics supplied].

It would finally appear that Respondent's arguments are more addressed to what he believes the law *ought* to be rather than to what, under the "historical approach" of the *Mueller* case on appeal, the law in fact was during the taxable years in question. Petitioner's position is that where an organization is created and operated in such a manner as to exclude private gain, the "ultimate destination" test has been applied by most jurisdictions considering the problem and represents the sound view of the law prior to the 1950 Revenue Act.

4. Petitioner Was Exempt Under I. R. C. § 101(6).

The Tax Court decision in the instant case was squarely grounded upon the rejection of the "feeder corporation" theory of exemption. This was a narrow, and it is submitted erroneous, ground of decision.

Should this Court decide to align itself with the Second, Third, Fifth and Sixth Circuits and with the Court of Claims, and determine to reject the view of the Tax Court and the Fourth Circuit, it will further be necessary for this Court to find as a matter of law—or for this Court to remand to the Tax Court for its further factual finding—that Petitioner in the instant case fits within the majority rule, and within the other requirement of §101(6). Our opening brief attempted to provide the arguments supporting such a finding that Petitioner meets all the tests of exemption laid down by I. R. C., §101(6).

Conclusion.

Petitioner respectfully submits that the Tax Court decision is in error and should be reversed.

Respectfully submitted,

MARTIN H. WEBSTER,
Attorney for Petitioner.

Dated: March 1, 1954.

No. 14054

United States
Court of Appeals
for the Ninth Circuit.

GEORGE SLAFF, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Respondent:

CLAYTON J. BURRELL, Esq.

The Tax Court of the United States

Docket No. 30464

GEORGE SLAFF, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated June 19, 1950 and as a basis of his proceedings alleges as follows:

1.

The petitioner is an individual residing at 6875 Pacific View Drive, Los Angeles, California.

2.

The notice of deficiency, a copy of which is attached and marked Exhibit "A" was mailed to the petitioner on June 19, 1950.

3.

The taxes in controversy are income and victory taxes for the taxable year ended December 31, 1943 and income taxes for the taxable year ended De-

cember 31, 1944, in the amounts, respectively, of $356.25 and $473.00.

4.

The determination of tax set forth in the said notice of deficiency is based on the following errors:

(a) The Commissioner erred in adding to income and considering as income salary of the petitioner received as an employee of the American Red Cross for services while a resident of a foreign country or countries.

(b) The Statute of Limitations of three years provided in Section 275(a) of the Internal Revenue Code had tolled before the mailing of the notice of deficiency on June 19, 1950 and the Commissioner is without authority to either assess any amount of income taxes as to this petitioner, for the taxable years 1943 and 1944, make any distraint, or begin any proceeding in court for the collection of any such taxes for the said years, over three years having elapsed after the returns for 1943 and 1944 were filed.

5.

Petitioner's income tax returns for the taxable years ending December 31, 1943 and December 31, 1944 were each filed on April 28, 1947.

6.

At no time has the petitioner, or any person duly authorized to act on behalf of the petitioner, extended the period of time within which the amount of any income taxes due under any return of the petitioner made by or on behalf of him for the tax-

able years ended December 31, 1943 and December 31, 1944 might be assessed, nor has the petitioner, or any person duly authorized to act on behalf of the petitioner, at any time agreed with the Commissioner of Internal Revenue or consented to him that such period of time within which such aforesaid income taxes might be assessed be extended for such aforesaid taxable years.

7.

Petitioner has at no time, by a signed notice in writing, filed with the Commissioner of Internal Revenue, or otherwise, waived the restrictions provided in Subsection (a) of Section 275 of the Internal Revenue Code on the assessment and collection of the whole or any part of the deficiency claimed by the Commissioner of Internal Revenue for the taxable years ended December 31, 1943 and December 31, 1944.

8.

No notice of deficiency in respect of any tax alleged to be due by petitioner for the taxable years ending December 31, 1943 and December 31, 1944, respectively, was ever sent by the Commissioner of Internal Revenue by registered mail to the petitioner within three years after petitioner's income tax returns for the years 1943 and 1944 were filed.

9.

The notice of deficiency concerning the taxable years ending December 31, 1943 and December 31, 1944 (Exhibit "A" attached hereto) which the Com-

missioner of Internal Revenue did mail to petitioner was mailed on June 19, 1950, over fifty days beyond three years after the filing of petitioner's income tax returns for the years 1943 and 1944.

10.

Petitioner was a resident of a foreign country and foreign countries from on or about September 29, 1942 to on or about December 24, 1944, and at no time from such aforesaid date in 1942 until such aforesaid date in 1944 returned to, or was a resident of, the United States

11.

Petitioner was outside of the United States for the entire period from approximately September 29, 1942 to approximately December 24, 1944.

12.

Petitioner was a resident of a foreign country or countries during the entire taxable year 1943.

13.

Petitioner's services were rendered in a foreign country and foreign countries.

14.

Petitioner's income for the period from on or about September 29, 1942 to on or about December 24, 1944 was earned from sources without the United States.

15.

Petitioner relies upon the facts alleged in paragraphs numbered 5 to 14, inclusive, as the basis of this proceeding and as sustaining the assignments of error made herein.

Wherefore, petitioner prays that this court may hear and determine this petition.

/s/ GEORGE SLAFF,
Petitioner, pro se

State of California,
County of Los Angeles—ss.

George Slaff, of full age, being duly sworn, says that he is the petitioner aforenamed; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ GEORGE SLAFF

Subscribed and sworn to before me this 8th day of September, 1950.

[Seal] /s/ MARIAN NEWMAN,
Notary Public in and for said County and State.
My Commission expires Jan. 18, 1952.

EXHIBIT "A"

Form 1279 (Rev. July 1948)—Seal of Office of Internal Revenue Agent in Charge, Newark Division, 581 Broad Street, 90-D SN-IT-7

Treasury Department
Internal Revenue Service
Newark 2, New Jersey

Mr. George Slaff June 19, 1950
70 Pine Street, New York, New York

Dear Mr. Slaff:

You are advised that the determination of your income and victory tax liability for the taxable year ended December 31, 1943, discloses a deficiency of $356.25 and that the determination of your income tax liability for the taxable years ended December 31, 1944 and 1945, discloses deficiencies of $473.00 and $153.36, respectively, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward

it to the Internal Revenue Agent in Charge, 581 Broad Street, Newark 2, New Jersey for the attention of EHP-90D. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner,

By .....
Internal Revenue Agent in Charge

EHP/lfw
Enclosures: Statement, Form of Waiver.
GPC 16-32058-5

Statement

Mr. George Slaff, 70 Pine St., New York, N. Y.

Tax liability for the Taxable Years Ended December 31, 1943, 1944 and 1945.

Income Tax (and Victory Tax for 1943)

Year	Deficiency
1943	$356.25
1944	473.00
1945	153.36
Total	$982.61

In making this determination of your income and victory tax liability, careful consideration has been

given to the report of examination dated May 20, 1947; to your protest dated June 20, 1947 and to the statements made at the conferences held on September 17, 1947, November 16, 1948, and May 25, 1950.

It has been determined that you were not a bona fide resident of a foreign country during the period of your employment by the American Red Cross in foreign countries, and your salary is not exempt from tax under section 116 of the Internal Revenue Code.

It has been determined further that you are not entitled to a surtax exemption of $500.00 for your wife for the taxable year 1945.

A copy of this letter and statement has been mailed to your representative, Mr. Samuel Slaff, 70 Pine Street, New York, New York, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Year Ended Dec. 31, 1942—Adjustments to Net Income

Net income as disclosed by return	$5,179.32
Unallowable deductions and additional income: (a) Salary	825.00
Total	$6,004.32
Nontaxable income and additional deductions: (b) Rent	49.02
Corrected net income	$5,955.30

Year Ended Dec. 31, 1942—Explanation of Adjustments

(a) Salary received from the American Red Cross, in the sum of $825.00 is held properly includible in taxable income.

(b) Depreciation of $49.02 is allowed on improvements to property of $1,313.88 in 1941 disallowed as deductions from income of that year.

Computation of Income Tax

Net Income	$5,955.30
Less: Personal exemption	500.00
Surtax net income	$5,455.30
Less: Earned income credit	595.53
Net income subject to normal tax	$4,859.77
Normal tax	$ 291.59
Surtax	871.06
Total income tax	$1,162.65

Taxable Year Ended Dec. 31, 1943—Adjustments to Net Income

	Income Tax Net Income	Victory Tax Net Income
Net income as disclosed by return	$	$ ....
Unallowable deductions and additional income:		
(a) Salary	3,300.00	3,300.00
Corrected net income	$3,300.00	$3,300.00

Explanation of Adjustment

(a) Salary of $3,300.00 received from the American Red Cross is held subject to the Federal income and victory taxes.

Taxable Year Ended Dec. 31, 1943—Computation of Income and Victory Tax

1.	Income tax net income		$3,300.00
2.	Less: Personal exemption		500.00
3.	Surtax net income		$2,800.00
4.	Less: Earned income credit		330.00
5.	Balance subject to normal tax		$2,470.00
6.	Normal tax at 6 percent	$ 148.20	
7.	Surtax on item 3	388.00	
8.	Total income tax (item 6 plus item 7)		536.20
11.	Victory tax net income	$3,300.00	
12.	Less: Specific exemption	624.00	
13.	Income subject to victory tax	$2,676.00	
14.	Victory tax before credit (5 percent of line 13)	$ 133.80	
15.	Less: Victory tax credit	33.45	
16.	Net victory tax		100.35
17.	Net income tax and victory tax		$ 636.55

18.	Income tax for 1942	$1,162.65
19.	Amount of item 17 or 18 whichever is larger	$1,162.65
20.	Forgiveness feature:	
	(a) Amount of item 17 or 18 whichever is smaller	$636.55
	(b) Amount forgiven (three-fourths of (a))	477.41
	(c) Amount unforgiven	159.14
21.	Total income and victory tax liability	$1,321.79
22.	Income and victory tax liability disclosed by return	965.54
23.	Deficiency of income and victory tax	$ 356.25

Taxable Year Ended Dec. 31, 1944—Adjustments to Net Income

Adjusted Gross Income as disclosed by return	$ None
Unallowable deductions and additional income: (a) Salary	3,337.50
Corrected adjusted gross income	$3,337.50

Taxable Year Ended Dec. 31, 1944—Explanation of Adjustments

(a) Compensation of $3,337.50 received from the American Red Cross is held properly includable in taxable income.

Computation of Income Tax

Adjusted gross income	$3,337.50	
Surtax exemptions—two		
Income tax liability (Per "Supplement T" Tax Table		$ 473.00
Income tax liability disclosed by return		None
Deficiency of income tax		$ 473.00

Taxable Year Ended Dec. 31, 1945—Adjustments to Net Income

Net Income as disclosed by return	$7,310.89	
Unallowable deductions and additional income: (a) Rents and royalties	10.20	
Corrected net income		$7,321.09

Explanation of Adjustments

(a) An error in addition on your return is corrected here.

Computation of Income Tax

1.	Net income	$7,321.09	
2.	Less: Surtax exemption	500.00	
3.	Surtax net income	$6,821.09	
4.	Surtax		$1,606.33
5.	Net income	$7,321.09	
6.	Less: Normal tax exemption	500.00	

8.	Balance subject to normal tax	$6,821.09
9.	Normal tax at 3%	204.63
10.	Income tax liability	$1,810.96
11.	Income tax liability disclosed by return	1,657.60
12.	Deficiency of income tax	$ 153.36

[Endorsed]: T.C.U.S. Filed Sept. 11, 1950.

[Title of Tax Court and Cause.]

ANSWER

Now comes the Commissioner of Internal Revenue by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition in the above-entitled proceeding admits, denies and alleges as follows:

1. Admits that the petitioner is an individual. Denies the remaining allegations of paragraph 1 of the petition. Alleges that the petitioner resides at 16 Grove Street, Passaic, New Jersey and has an office located at 70 Pine Street, New York, New York.

2. Admits the allegations of paragraph 2 of the petition.

3. Admits the allegations of paragraph 3 of the petition.

4. (a) and (b) Denies the allegations of paragraphs 4 (a) and (b) of the petition.

5. Admits that the returns for the periods here involved were filed with the Collector of Internal Revenue for the Fifth Collection District of New Jersey at Newark, New Jersey. Denies the remaining allegations of paragraph 5 of the petition.

6. Denies the allegations of paragraph 6 of the petition.

7. Denies the allegations of paragraph 7 of the petition.

8. Denies the allegations of paragraph 8 of the petition.

9. Admits that a notice of deficiency, a copy of which was attached to the petition and marked Exhibit "A" thereof, was mailed to the petitioner on June 19, 1950 by the Commissioner of Internal Revenue. Denies the remaining allegations of paragraph 9 of the petition.

10. Denies the allegations of paragraph 10 of the petition.

11. Denies the allegations of paragraph 11 of the petition.

12. Denies the allegations of paragraph 12 of the petition.

13. Denies the allegations of paragraph 13 of the petition.

14. Denies the allegations of paragraph 14 of the petition.

15. Denies the allegations of paragraph 15 of the petition.

16. Denies generally each and every allegation of

the petition not hereinabove specifically admitted, qualified or denied.

Further answering the petition, respondent alleges:

17. That the petitioner filed with the Collector of Internal Revenue for the Fifth Collection District of New Jersey at Newark, New Jersey, his income tax return for the taxable year 1943 wherein he reported no gross income.

18. That on June 19, 1950, the respondent, by registered mail, sent to the petitioner a notice of deficiency wherein he determined a deficiency in income tax for the taxable year 1943 in the amount of $356.25.

19. That in said return for the taxable year 1943 petitioner failed to include in his gross income certain income received as compensation in an amount of at least $3,300.00, which amount is properly includible therein.

20. That the petitioner omitted from gross income as reported on his return for the taxable year 1943, an amount properly includible therein which was in excess of 25 per centum of the amount of gross income reported in said return.

21. That the petitioner filed with the Collector of Internal Revenue for the Fifth Collection District of New Jersey at Newark, New Jersey his income tax return for the taxable year 1944 wherein he reported no gross income.

22. That on June 19, 1950, the respondent, by registered mail, sent to the petitioner a notice of deficiency wherein he determined a deficiency in in-

come tax for the taxable year 1944 in the amount of $473.00.

23. That in said return for the taxable year 1944 petitioner failed to include in his gross income certain income received as compensation in an amount of at least $3,337.50, which amount is properly includible therein.

24. That the petitioner omitted from gross income as reported on his return for the taxable year 1944, an amount properly includible therein which was in excess of 25 per centum of the amount of gross income reported in said return.

25. That the assessment of the deficiencies in income taxes for the taxable years 1943 and 1944 is not barred by the statute of limitations.

26. That the collection of the deficiencies in income taxes for the taxable years 1943 and 1944 is not barred by the statute of limitations.

Wherefore, it is prayed that the relief sought in the petition be denied.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue

Of Counsel:

HARTFORD ALLEN,
Division Counsel
JOHN E. MAHONEY,
Attorney, Bureau of Internal Revenue

[Endorsed]: T.C.U.S. Filed October 19, 1950.

[Title of Tax Court and Cause.]

REPLY

The above named petitioner, for his reply to the answer in the above entitled proceeding, admits, denies and alleges as follows:

1. Denies the allegations of paragraph "17" of the answer.

2. Admits that a notice of deficiency, a copy of which is attached to the petition and marked Exhibit "A", was mailed to the petitioner on June 19, 1950 at 70 Pine Street, New York, N. Y., respectfully refers the Court to Exhibit "A" attached to the petition and, except as herein admitted, denies the allegations of paragraph "18" of the answer.

3. Denies the allegations of paragraph "19" of the answer.

4. Denies the allegations of paragraph "20" of the answer.

5. Denies the allegations of paragraph "21" of the answer.

6. Admits that a notice of deficiency, a copy of which is attached to the petition and marked Exhibit "A", was mailed to the petitioner on June 19, 1950 at 70 Pine Street, New York, N. Y., respectfully refers the Court to Exhibit "A" attached to the petition and, except as herein admitted, denies the allegations of paragraph "22" of the answer.

7. Denies the allegations of paragraph "23" of the answer.

8. Denies the allegations of paragraph "24" of the answer.

9. Denies the allegations of paragraph "25" of the answer.

10. Denies the allegations of paragraph "26" of the answer.

Wherefore the petitioner prays that this Court may hear and determine the petition.

/s/ GEORGE SLAFF,
Petitioner, pro se

Duly Verified.

[Endorsed]: T.C.U.S. Filed December 4, 1950.

[Title of Tax Court and Cause.]

TRANSCRIPT OF TESTIMONY

Circuit Court of Appeals Courtroom, 16th Floor, Federal Building, Los Angeles, California. May 19, 1952—11:15 a.m.

(Met pursuant to notice.)

Before Honorable Clarence V. Opper, Judge.

Appearances: George Slaff, 6875 Pacific View Drive, Los Angeles 28, California, appearing on his own behalf. Clayton J. Burrell, (Honorable Charles W. Davis, Chief Counsel, Bureau of Internal Revenue), appearing for the Respondent.

Proceedings

The Clerk: Docket No. 30464, George Slaff.

The Court: State your appearances for the record, please.

Mr. Slaff: George Slaff, in person.

Mr. Burrell: Clayton J. Burrell, for Respondent. I am ready.

The Court: Proceed.

Mr. Slaff: Shall I be sworn, your Honor?

The Court: Well, I thought perhaps someone might want to make an opening statement.

Opening Statement on Behalf of the Petitioner
By Mr. Slaff

Mr. Slaff: I shall, if the Court please. There are two issues involved in this case, and only two. They are whether Petitioner is liable for taxes, having been claiming to be a bona fide resident of a foreign country during the years 1943 and 1944, having been in the service of the American Red Cross overseas during that period. More specifically, through all of the year 1943 and until December 22 or 24, 1944.

The other issue involved is whether the three-year statute of limitations under Section 275 (a), I believe, or the five-year statute of limitations, under Section 275 (c), is applicable, no notice of deficiency having been filed until more than three years, although less than five years after the returns were filed.

I have only one witness; myself.

The Court: Do you have anything you want to add to that?

Mr. Burrell: Your Honor, that is a fair statement of the issues involved in this case.

The Court: Very well.

Whereupon,

GEORGE SLAFF

called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated. State your name and address for the record, Mr. Witness.

The Witness: My name is George Slaff. I live at 6875 Pacific View Drive, Los Angeles.

Direct Examination

The Court: You wish to make a statement, Mr. Slaff?

The Witness: Yes, sir. In the year 1942, having been classified as 4-F by my Draft Board because of physical disability, and having been refused entrance into three of the branches of the Armed Services, to which I applied, similarly on grounds of physical disability, I found employment with the American Red Cross approximately June or July of 1942. I was employed by the American Red Cross, with specific request on my part for service overseas.

In September of 1942 I was ordered by the American Red Cross for service in England.

I applied for and received an American passport and traveled to England as a civilian passenger on a civilian airline. I believe the American Export Line, on one of its clipper ships.

(Testimony of George Slaff.)

I left the United States approximately the end of September 1942, September 29th, I believe is the date of record, and arrived in England and I was assigned to a station in Greenock, Scotland, where I served with the American Red Cross approximately from the beginning of October 1942 until December 1942.

During that time I did not live at the American Red Cross quarters, but lived with a civilian family in Greenock. The name of the family was Mr. and Mrs. R. Gilchrist. I had a room in their home.

In December of 1942 I was assigned by the American Red Cross to serve in North Africa, and proceeded from England to North Africa, and lived there sometime toward the end of December 1942, sometime before Christmas.

In North Africa I served with the American Red Cross in the capacity of executive aide or executive assistant to the Delegate to North Africa. In Algiers I had an apartment for a time, a house for a time. I was in North Africa from approximately December of 1942 until approximately October of '43, when I was assigned for service in Italy.

I served in Italy—I arrived in Italy, in Naples, approximately October of 1943 and became director of food supply for the American Red Cross. In Italy I lived for—in Naples, while I was there, I lived for the bulk of the time that I was there in an apartment with one Ralph Howard, who was then correspondent for the National Broadcasting Company. We had our apartment and had a servant.

(Testimony of George Slaff.)

I was in Italy in the capacity I have mentioned from the time I arrived until approximately August, late August of 1944. That would be, for the record, from October of 1943 until approximately August of 1944.

I was then assigned to service in France, an entrance having been made into France through Southern France shortly before then, and I served in France at Marseilles and Dijon until approximately December, the middle of December of 1944.

Similarly, in Dijon I maintained or had an apartment in which I lived. And I might state, because I think it is relevant, obviously, and I think it should be stated, that my intention was not to remain away from the United States permanently. My intention—I wish to make it clear, in all fairness—my intention was to return to the United States when and if, I might say, my service with the American Red Cross overseas was completed.

I intended, however, and did intend to remain abroad as long as I was required to remain abroad, whether that might take a year or two years or five years; whatever the exigencies of that particular situation might demand.

I was returned to the United States in December of 1944 by the American Red Cross, on leave, and for the purpose of making certain appearances here in the United States on behalf of the American Red Cross.

As I say, I returned approximately, I think the

(Testimony of George Slaff.)

date was December 22, 1944. And in May, April or May of 1945 I left the service of the American Red Cross, having been requested to return to the service of the Government with the Federal Power Commission.

I am advised by counsel that I was liable for taxes in England and in France during the war. And I wish to state, for the record, however, that no taxes were paid by me, either in England or France, during the war.

On April 28, 1947, my returns for the years 1943 and 1944 were filed. And I should like to call upon counsel at this time to present those returns for the record, so they may be put in evidence.

Mr. Burrell: I will be glad to do that, your Honor.

Can you identify these as your returns, Mr. Slaff?

The Witness: Yes, those are both my returns for the years 1943 and '44, respectively.

Mr. Burrell: We will offer them as Respondent's Exhibits A and B, if your Honor please, and ask permission of the Court to substitute photostats at a later date.

The Court: Do you prefer to have them put in as joint exhibits?

The Witness: That is perfectly all right. It is a matter of complete indifference, so long as they are received in evidence.

(Testimony of George Slaff.)

The Court: All right. They will be received in evidence and marked.

The Clerk: Respondent's Exhibits A and B.

(The documents above referred to were received in evidence and marked Respondent's Exhibits A and B.)

DELINQUENT RETURN filed with I.A.A. Knapp Section 6

FORM 1040
Treasury Department
Internal Revenue Service

UNITED STATES
INDIVIDUAL INCOME AND VICTORY TAX RETURN

Page 1

1943

THE TAX COURT OF THE U.S. DIV. 14 DOCKET 3046 ADMITTED IN EVIDENCE MAY 19 1952 PETITIONER'S EXHIBIT A RESPONDENT'S

OPTIONAL FORM 1040A MAY BE FILED INSTEAD OF THIS FORM IF GROSS INCOME IS REPORTED ON THE CASH BASIS FOR THE CALENDAR YEAR, IS NOT MORE THAN $3,000, AND CONSISTS WHOLLY OF SALARY, WAGES, OTHER COMPENSATION FOR PERSONAL SERVICES, DIVIDENDS, INTEREST OR ANNUITIES

(Do not use these spaces)

File No. 212-401

District

(Collector's Stamp)

FOR CALENDAR YEAR 1943

or fiscal year beginning ..... 1943, and ending 1944

PRINT NAME AND ADDRESS PLAINLY. (See Instruction C)

GEORGE SLAFF
(Name) (Use given names of both husband and wife, if this is a joint return)

16 GROVE ST.
(Street and number, or rural route)

PASSAIC N. J.
(City or town) (State)

Occupation ATTORNEY Social Security number, if any

COMPUTATION OF NET INCOME

	Column 1 Income Tax Net Income	Column 2 Victory Tax Net Income
INCOME	RECEIVED APR 28 1947 COLL. INT. REV. SIX DIST. N. J.	
1. Salary, Wages, and Compensation for Personal Services (Members of armed forces see Instruction I) — Employer's Name: American Red Cross – Overseas; City and State: Dept 1942 Ft Dix 1944 Cuba; Received 3300; exempt under section 116 I.R.C. therefore not taxable income. Total ... Less: Deductible expenses. (Attach itemized statement) ... Compensation after deductible expenses	$ None	$ None
2. Dividends	$	$
3. Interest on corporation bonds, bank deposits, notes, etc		
4. Interest on Government obligations, etc.: (a) From line A (8), Schedule A		
(b) From line B (5) and (3), Schedule A		XXXXXXX XX
5. Annuities		
6. (a) Net gain (or loss) from sale or exchange of capital assets. (From Schedule B)		XXXXXXX XX
(b) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule B)		
7. Rents and royalties. (From Schedule C (1))		
8. Net profit (or loss) from business or profession. (From Schedule C (2)) (State total receipts, from line 1, Schedule C(2) $)		
9. Income (or loss) from partnerships; fiduciary income; and other income. (From Schedule C (3))		
10. Total income in items 1 to 9	$ None	$ None
DEDUCTIONS		
11. Contributions. (Explain in Schedule D)	$	XXXXXXX XX
12. Interest. (Explain in Schedule E) (See Instructions 12 and 16 for Victory Tax deduction)		XXXXXXX XX
13. Taxes. (Explain in Schedule F) (See Instructions 13 and 16 for Victory Tax deduction)		XXXXXXX XX
14. Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule G)		XXXXXXX XX
15. Medical, dental, etc., expenses. (Explain in Schedule H)		XXXXXXX XX
16. Other deductions authorized by law. (Explain in Schedule G)		
17. Total deductions in items 11 to 16	$	$
18. Income Tax net income (item 10, col. 1, less item 17, col. 1)	$ None	XXXXXXX XX
19. Victory Tax net income (item 10, col. 2, less item 17, col. 2)	XXXXXXX XX	$ None
INCOME AND VICTORY TAX		
20. Unpaid balance of 1943 Income and Victory Tax (from line 22, page 4)		$ None
21. You may postpone, until not later than March 15, 1945, payment of the amount you owe up to one-half of item 19 (c), page 4. Enter the amount postponed. (For persons whose surtax net income for 1942 or 1943 exceeded $20,000, see Schedule L–2)		
22. Amount paid with this return (item 20 less item 21)		$
23. Refund or Credit — If the total of your payments (line 21 (d) on page 4) is larger than your tax (line 20 on page 4), enter the difference. Indicate by a check mark (√) what you want done with this overpayment: Refund it to me ☐; Apply it on my 1944 estimated tax ☐.		$

I declare under the penalties of perjury, that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return) (Date)

(Name of firm or employer, if any)

George Slaff 2/28/47
(Taxpayer's signature) (Date)

(If this is a joint return (or fiduciary return) it must be signed by both husband and wife. A return made by an agent must be accompanied by power of attorney). (See Instruction C)

Respondent's Exhibit A (Continued)

6

COMPUTATION OF INCOME AND VICTORY TAX. (See Tax Computation Instructions)

			Page
1. Income Tax net income (item 18, page 1)			
2. Less: Personal exemption. (From Schedule J-(1))			$ None
3. Credit for dependents. (From Schedule J-(2))	$		
4. Balance (surtax net income)			
5. Less: Certain interest on Government obligations (item 4 (a), page 1)			$
6. Earned income credit. (From Schedule J-(1) or J-(2))	$		
7. Balance subject to normal tax			
8. Normal tax (6% of line 7)			$ None
9. Surtax on amount in line 4. (See Surtax Table, page 5 of Instructions)			$ None
10. Total Income Tax (line 8 plus line 9). (If Schedule B is used and alternative tax computation made, enter line 16, Schedule B)			
11. Less: Income Tax paid to a foreign country or U. S. possession. (Attach Form 1116)			$ None
12. BALANCE OF INCOME TAX			
13. NET VICTORY TAX (line 6 of Victory Tax Schedule, below)			$
14. Total of lines 12 and 13			
15. Income Tax paid at source on tax-free covenant bond interest. (See Footnote 1)			$
16. Line 14 less line 15			
17. Income Tax for 1942. (See Statement, Form 1125, from Collector) (First, see page 4 of Instructions)			$
18. Enter line 16 or 17 whichever is LARGER. (Members of the armed forces see page 4 of Instructions)			$
19. FORGIVENESS FEATURE (Don't fill in (a), (b), and (c) below, if either line 16 or 17 is $50 or less):			$
(a) Enter line 16 or 17, whichever is SMALLER			
(b) Enter $50 or three-fourths of (a), immediately above, whichever is LARGER. This is the FORGIVEN part of the tax	$		
(c) Enter the UNFORGIVEN part of the tax which is the BALANCE (subtract (b) from (a)). (See Footnote 2)	$		
20. TOTAL INCOME AND VICTORY TAX. (Total of lines 18 and 19 (c))			$ None
21. Less: (a) Income and Victory Tax withheld by employer	$		
(b) Income Tax paid on 1942 income			
(c) Tax paid on 1943 income on account of Declaration of Estimated Tax			
(d) Total payments			
22. UNPAID BALANCE OF INCOME AND VICTORY TAX. (If line 20 is larger than line 21 (d), enter the difference here and also as item 20, page 1; if not, see item 23, page 1)			$ None

FOOTNOTE 1.—If you claim a credit in line 16, disregard lines 19 (a) and (b), complete Schedule L-1 on page 4 of Instructions, and enter result in line 19 (c). Attach completed schedule.

FOOTNOTE 2.—If your surtax net income for 1942 or 1943 exceeded $20,000, requiring you to complete Schedule L-2, enter here the amount shown on line 10 or 27 of such schedule, $ and increase 18 (c) by such amount.

Schedule K.—VICTORY TAX. (See Tax Computation Instructions)

1. Victory Tax net income (item 19, page 1)	
2. Less: Specific exemption ($624 if return reports income of only one person; otherwise, see Instructions, page 3)	$ None
3. Income subject to Victory Tax (line 1 less line 2)	
4. Victory Tax before credit (5% of line 3)	$
5. Victory Tax credit:	$
(a) Single person, or married person not living with husband or wife: 25% (plus 2% for each dependent) of line 4, but not more than $500 (plus $100 for each dependent)	
(b) Married person living with husband or wife if separate returns are filed: 40% (plus 2% for each dependent) of line 4, but not more than $500 (plus $100 for each dependent)	$
(c) Married person living with husband or wife if only one return or a joint return is filed, or head of a family: 40% (plus 2% for each dependent) of line 4, but not more than $1,000 (plus $100 for each dependent). (See Schedule J (2), for exclusion of one dependent by head of a family)	$
6. Net Victory Tax (line 4 less line 5). (Enter in line 13, above)	$ None

Schedule L.—To be used only by individuals whose surtax net income for 1942 or 1943 exceeded $20,000. Schedule to determine whether Section 6 (c) of the Current Tax Payment Act of 1943 is applicable

1. Surtax net income for 1942 (item 23, Form 1040 (1942))		$
2. Surtax net income for 1943 (line 4, above)		$
3. Surtax net income for base year, $ ..... plus $20,000	$	(Check year used 1937 ...; 1938 ...; 1939 ...; 1940 ....)

If either line 1 or 2 is greater than line 3, separate Schedule L-2 should be secured from the collector and filed with and as a part of this return.

Note.—If a joint return is filed for either 1942 or 1943 and separate returns for the other of such years, enter the aggregate of the separate surtax net incomes for the separate return year. The surtax net income to be entered in line 3 shall be determined in the same manner as the surtax net income entered in line 1 or 2, whichever is the lesser.

DELINQUENT RETURN filed WITH I.R.N.L. Copy 4/11/47

File this return with Collector of Internal Revenue on or before March 15, 1945. (Any balance of tax due (Item 8, below) must be paid in full with return. See separate Instructions for filling out return.

Page 1

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1944

1944

THE TAX COURT OF THE U.S. DOCKET NO. 94702 FILED IN EVIDENCE MAY 19 1952 EXHIBIT B RESPONDENT'S

or fiscal year beginning ..... 1944, and ending 1945

Do not write in these spaces

File Code

Serial No. 7844901

District

(Cashier's Stamp)

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2 (Rev.), as your return, if your total income was less than $5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than $100 of other wages, dividends, and interest.

NAME GEORGE SLAFF
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS 16 GROVE ST.
(PLEASE PRINT. Street and number or rural route)

PASSAIC (City or town, postal zone number) N.J. (State)

Social Security No. (if any) .....

Your Exemptions

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than $500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

NAME (Please print)	Relationship	NAME (Please print)	Relationship
Your name GEORGE	X X X X X X X X X		
EVE	WIFE		

RECEIVED APR 28 1947 (illegible)

Your Income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

PRINT EMPLOYER'S NAME	WHERE EMPLOYED (CITY AND STATE)	AMOUNT	
Secretarial Mail	Essex Intercount	$	
Sent 1944 W.T. Rec. 1944	Miscellaneous	.....	
Unkn. P.O.C.	Delight Unknown	.....	
P.C. Claim 116 I.R.C. Thereafter see Tax Return		.....	
	Enter total here →		$ None

3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation) ..... $ .....

4. If you received any other income, give details on page 3 and enter the total here ..... $ .....

5. Add amounts in items 2, 3, and 4, and enter the total here ..... $ None

If item 5 includes income of both husband and wife, show husband's income here, $ .....; wife's income here, $ .....

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN $5,000.—You may find your tax in the tax table on page 2. This table, which is provided by law, is based on the same tax rates as are used in the Tax Computation on page 4. The table automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 4.

IF YOUR INCOME WAS $5,000 OR MORE.—Disregard the tax table and compute your tax on page 4. You may either take a standard deduction of $500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax Due or Refund

6. Enter your tax from table on page 2, or from line 15, page 4 ..... $ None

7. How much have you paid on your 1944 income tax?

(A) By withholding from your wages (Attach Withholding Receipts, Form W-2) $ .....

(B) By payments on 1944 Declaration of Estimated Tax .....

Enter total here → .....

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here ..... $ None

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here $ .....

Check (✓) whether you want this overpayment: Refunded to you [ ] or Credited on your 1945 estimated tax [ ]

If you filed a return for a prior year, what was the latest year? .....

To which Collector's office was it sent? .....

In which Collector's office have you paid any amount claimed in item 7 (A) above? .....

Is your wife (or husband) making a separate return for 1944? ..... (Yes or No)

If "Yes," write below

Name of wife (or husband) .....

Collector's office to which sent .....

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of taxpayer) (Date) 3/24/47

(Signature of person (other than taxpayer or agent) preparing return) (Date)

(Name of firm or employer, if any)

(If this is a joint return of husband and wife, it must be signed by both)

(SEE TAX TABLE BELOW)

16—41000-1

(Testimony of George Slaff.)

The Witness: As appears on the face of those exhibits, they were filed on April—both filed on April 28, 1947, with the Collector of Internal Revenue for the Fifth District of New Jersey.

Similarly, as appears on the face of both exhibits, on the face of Exhibit A, my return for 1943, I stated, under the heading on the first page of the exhibit, of the return, Exhibit A, "Income," the following:

> "American Red Cross—(overseas September 1942 to December 1944) income received $3,-300.00; exempt under Section 116 I.R.C., therefore, no taxable income."

Similarly, my return for the year 1944, Exhibit B, I stated also, on the face of page 1 of that exhibit, the same words:

> "American Red Cross—(overseas September 1942 to December 1944), income received $3,-300.00. Exempt under Section 116 I.R.C. Therefore, no taxable income."

I wish to state for the record that no extension of the statute of limitations has been filed or entered into or made by me or by anyone authorized to act on my behalf. Nor has any waiver of the statute of limitations been filed, executed by myself or by anyone acting on my behalf.

As appears from the pleadings, and as is the fact, in any event, notice of deficiency was mailed to me on June 19, 1950, more than three years after the returns were filed; which returns had showed my

(Testimony of George Slaff.)
total gross income to be $3,300.00 for each one of the years in question.

That concludes my testimony, your Honor.

Mr. Burrell: Your Honor please, I would like to question the witness on cross examination.

The Court: All right.

Cross Examination

Q. (By Mr. Burrell): Mr. Slaff, what is your business or profession?

A. I am an attorney.

Q. Were you a member of the Bar in 1943 and '44, when these returns were filed?

A. Yes, I was. The returns were filed in 1947, Mr. Burrell. However, I was a member of the Bar in '43, '44 and '47.

Q. Were you a practicing attorney prior to the war and prior to your going overseas?

A. Yes.

Q. What was your professional relationship? Were you in a firm somewhere in the East, or what was your circumstance in that regard?

A. At what time?

Q. In 1942, prior to your accepting the Red Cross position.

A. Prior to 1942 I was counsel to the Federal Power Commission in Washington, D. C.

Q. Did you obtain a leave of absence from that position, or did you resign?

A. No, I didn't—I am quite sure I did not resign, Mr. Burrell. I would assume that I received

(Testimony of George Slaff.)

a leave of absence and, in any event, I returned to the Federal Power Commission in a different capacity on termination of my services with the American Red Cross.

So the record will be complete in that respect, I think before I left for overseas, or for service with the American Red Cross I probably held the position of principal attorney with the Federal Power Commission.

When I returned I was engaged as chief counsel of the Federal Power Commission, and not general counsel, but chief counsel in charge of a nationwide investigation of natural gas resources, et cetera. It was in a different capacity, however, from that which I had left in 1942.

Q. Do you have a family, Mr. Slaff?

A. I have now.

Q. Did you have in 1942?

A. Well, if you mean a wife and children, no. I was not married. And I might, if I may say so at this time, state what I should have stated on direct examination, that on leaving the United States in September of 1942 I gave up the apartment which I had maintained in Washington up to that time, which was the only place of permanent abode or residence or domicile which I had maintained in the United States up to that time.

Q. When were you married, Mr. Slaff?

A. Shortly after my return from overseas.

Q. Did you own any real property in the United States prior to your leaving for overseas?

(Testimony of George Slaff.)

A. Yes, sir.

Q. What disposition, if any, did you make of it while you were overseas, while you were gone overseas?

A. Let me make the record clear. That property was in my name, and when I left for overseas I transferred that property to my brother.

Q. That was a complete disposition or was it still subject to your——

A. No, it was a complete disposition.

Q. It was your intention to return to the United States when your tour of duty overseas was finished?

A. Let me put it this way: It was my hope to return to the United States. Yes, certainly, I intended to return to the United States if I was physically able to do so.

Q. In that regard, your intention would be no different from a boy serving in uniform overseas, or something of that sort?

A. I should prefer not to speak for the intentions of the men serving in uniform. I can speak for my own.

Mr. Burrell: I believe that is all.

The Court: Do you have any redirect?

The Witness: No, I have no further testimony.

The Court: I am not sure I heard you mention this one way or the other: But referring now to the two tax returns that have been produced and marked in evidence, Respondent's Exhibits A and B, I notice that they are both termed "Delinquent Returns."

(Testimony of George Slaff.)

Of course, they would look on their face as though they were delinquent, bearing in mind the years for which they are filed and the dates which they appear to have been filed.

Was there any correspondence or communication of any kind between you and the Bureau, giving you leave to file those late returns?

The Witness: Yes, there was—not by me, but on my behalf, sir. By my brother, who acted as my attorney, in fact.

The Court: Since you are only answering my question, I am not going to ask you the question in such a way as to call for inadmissible evidence.

If there is anything like that and if it is in writing, of course, it would be the best evidence. I am simply saying that had your answer been "No," that would have been different.

If you want to go into that further, of course, you will have an opportunity to do that.

The Witness: Well, I must say I don't understand the contention in which your Honor raises the fact that this is marked "Delinquent Return."

The Court: One of the things I have in mind—perhaps I shouldn't be so uninformed about it myself—but I can't recall any cases which deal with the question of the running of the statutes in the case of a delinquent return.

I am raising the point now because this is the only time I will have the chance to raise it.

I will expect, of course, that you will deal with that in your brief, but that wouldn't take the place

(Testimony of George Slaff.)

of any evidence or any testimony that might bear on the question.

The Witness: Would your Honor give me a moment?

The Court: Yes.

The Witness: I can only add, your Honor, that an affidavit was filed on my behalf by my attorney in 1947, January in 1947, or thereabouts, stating why the return had not been filed earlier and asking that no delinquent penalties be levied, and no delinquent penalties were levied. If that adds anything to the——

The Court: I can see there is no delinquency penalty involved. It apparently was not raised in either the deficiency notice or the answer.

The Witness: That is correct.

Mr. Burrell: May I ask another question of this witness in this very regard?

The Court: Yes.

Q. (By Mr. Burrell): Are these returns, Respondent's Exhibits A and B, the only returns filed with regard to the years 1943 and '44?

A. Yes, they are.

Q. No other returns were filed?

A. No.

The Court: Is that your case?

The Witness: That is all.

Mr. Burrell: That is all.

The Court: You may be excused.

(Witness excused.)

The Court: Mr. Slaff, do you want time for filing a brief?

Mr. Slaff: Yes, your Honor.

The Court: How much time?

Mr. Burrell: Your Honor please, I would like the privilege of filing a consecutive brief, some reasonable time after the Petitioner has filed his brief.

Mr. Slaff: I have no objection. I should think we could file them concurrently and get them over with that much faster.

The Court: This is kind of a roundabout way of giving the Respondent more time.

Mr. Slaff: Apparently, I will have an opportunity to——

The Court: Is 45 days enough for your original brief?

Mr. Slaff: Ample.

The Court: How much time do you want for your answering brief?

Mr. Burrell: 30 days. Would that be agreeable?

The Court: 30 days thereafter for Respondent to answer.

How much time do you want for your reply?

Mr. Slaff: I should say 15 days.

The Court: 15 days thereafter for the Petitioner to reply.

Read those dates, please, Mr. Clerk.

The Clerk: Yes, sir.

Mr. Burrell: Your Honor please, I would like to have the Court's permission to have the original briefs returned to us and substitute the photostats.

The Court: You mean the exhibits?

Mr. Burrell: Yes.

The Court: You want permission to withdraw them and photostat them?

Mr. Burrell: Yes.

The Court: That may be done.

Mr. Clerk: Petitioner's brief is due on July 3rd. Respondent's answering brief, on July 4th.

Petitioner's reply brief, on August 19th.

Mr. Slaff: In view of the possibility I might be on vacation at that time, might I ask for a month?

The Court: For the reply?

Mr. Slaff: Yes.

Mr. Burrell: I suppose I will have an opportunity to file a reply brief to that?

The Court: Yes. 30 days for reply instead of 15.

Mr. Burrell: That will be September 3rd instead of August 19th?

The Clerk: Yes.

(Whereupon, at 12:00 o'clock noon, Monday, May 19, 1952, the hearing in the above-entitled matter was closed.)

[Endorsed]: T.C.U.S. Filed June 12, 1952.

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT AND OPINION

George Slaff, pro se.

Clayton J. Burrell, Esq., for the respondent.

Opper, Judge: This proceeding is for a redetermination of a deficiency in income and victory taxes for 1943 and in income tax for 1944 in the amounts of $356.25 and $473, respectively. Two questions are presented for our decision:

1. Whether petitioner was a bona fide resident of a foreign country or countries during the period in question and thus exempt from payment of tax pursuant to section 116 of the Internal Revenue Code.

2. Whether the applicable Statute of Limitations period is three years as provided in section 275(a) of the Internal Revenue Code, or five years as provided in section 275(c) of the Internal Revenue Code.

Findings of Fact

For reasons of physical disability, petitioner, an individual, was classified by his draft board as 4-F and was refused entrance into three branches of the Armed Services in which he sought to enlist. Petitioner applied for overseas service with the American Red Cross (hereinafter called "Red Cross") and was employed by that organization in June or July 1942. He received a leave of absence from the Federal Power Commission where he held the position of principal attorney, made a complete disposi-

tion of the real property he owned in the United States, and gave up his apartment in Washington, D. C., which was the only permanent abode or residence he had maintained in the United States up to that time.

Having applied for and received an American passport, he was ordered by the Red Cross to England in September 1942. He flew there as a civilian passenger on a civilian airline. From October to December 1942, he served with the Red Cross in Greenock, Scotland and lived there with a civilian family rather than at the Red Cross quarters.

In December 1942, petitioner was assigned to North Africa where he served as Executive Aide or Executive Assistant to the Delegate to North Africa until October 1943. While in North Africa he had an apartment in Algiers for a time and a house for a time.

From October 1943 until August 1944, petitioner served in Naples, Italy, as Director of Food Supply for the Red Cross. For the bulk of his time there, he shared an apartment with a correspondent of the National Broadcasting Company.

In August 1944, petitioner was assigned to France, serving at Marseilles and Dijon until the middle of December 1944. In Dijon, he lived in an apartment.

In December 1944, petitioner was returned to the United States in order to make appearances on behalf of the Red Cross. The Federal Power Commission subsequently requested petitioner to return to its service. He did so in April or May of 1945,

being engaged as chief counsel in charge of a nation-wide investigation of natural gas resources, a different capacity from that which he had left in 1942.

Petitioner's intention upon going overseas was to return to the United States after serving abroad whatever period of time might be required. He was advised by counsel that he was liable for taxes in England and France during the war, but he paid no taxes to either country.

On April 28, 1947, petitioner filed his returns for the years 1943 and 1944 with the collector of internal revenue for the fifth district of New Jersey. He stated on the first page of his 1943 return under the heading "Income" the following:

> American Red Cross—Overseas Sept. 1942 to Dec. 1944. Income received $3300; exempt under Section 116 I.R.C.; therefore no taxable income.

After the words "Enter total here," he wrote "None." A similar statement was made in the return for 1944.

Notice of deficiency was mailed by respondent to petitioner on June 19, 1950, more than three years after the returns were filed. No waiver extending the Statute of Limitations has been filed, entered into or made by petitioner or anyone acting on his behalf.

Petitioner was not a bona fide resident of a foreign country or countries during either 1943 or 1944.

Petitioner omitted from gross income reported for the years 1943 and 1944 amounts properly in-

cludible therein which, for each of said years, are in excess of 25 per centum of the amount of gross income stated in the respective returns.

Opinion

The preliminary question is whether under section 275(c) respondent had five years within which to determine a deficiency prior to the running of the Statute of Limitations.[1] This question has already been decided adversely to petitioner's contention. It is not sufficient that the receipt of the amounts in question appears on the return.

> * * * Although an amount may be disclosed fully on the return, if it is not reported as a part of the gross taxable income, it is not a part of the "gross income stated in the return" as that phrase is used in section 275(c). * * * [M. C. Parrish & Co., 3 T. C. 119, 130-131, affd. (C.A. 5), 147 F. 2d 284. (Emphasis added.)

The treatment by petitioner of the disputed item is exemplified by the following quotation from his 1944 tax return:

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[1] "Sec. 275. Period of Limitation Upon Assessment and Collection.
* * * * *

"(c) Omission from Gross Income.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed."

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, Before Pay-Roll Deductions for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

Print Employer's Name Where Employed (City and State) Amount: American Red Cross (Overseas Sept. 1942 to Dec. 1944) Income received $3300; exempt under Section 116 I.R.C.; therefore no taxable income. Enter total here $ None.

The claim that such payments were exempt from income tax is at war with the assumption that the amounts are "properly includible" in his gross income. His statement necessarily results in a failure to include that amount or in fact any amount whatever in his gross income. See American Foundation Co., 2 T. C. 502; Emma B. Maloy, 45 B.T.A. 1104. Since this was petitioner's only income the conclusion is inevitable that not 25 per cent but 100 per cent was omitted from gross income if the sums in question were properly includible therein.

We come then to the substantive question whether the payments to petitioner were exempt because he was a resident of a foreign country during each of the years involved. This question also we regard as having been ruled upon adversely to petitioner's position. Although both parties view the question as one of fact, Charles F. Bouldin, 8 T. C. 959, and on that approach it may be assumed that our ultimate finding disposes of the question, it is equally true

that on facts not in any material respect distinguishable from those here present it was determined that the taxpayer was not a bona fide resident of a foreign country. In William B. Cruise, 12 T. C. 1059, the taxpayer, like the present petitioner, was assigned to duties abroad by the American Red Cross. Perhaps less favorably to respondent's contention in the Cruise case the petitioner there spent some three years in one assignment and claimed a possible intention of remaining abroad. Here it seems evident from the circumstances disclosed that petitioner was at all times subject to instantaneous changes of assignment at the direction of the Red Cross; and he did in fact, in the approximately two years in which he was abroad, occupy four different positions in four different countries. He freely admits that his intention at all times was to return to the United States when the necessities of his Red Cross duties were terminated. In each country he was in effect "a mere transient or sojourner." Regulations 111, section 29.211-2.

As in Michael Downs, 7 T. C. 1053, 1059, affd. (C.A. 9), 166 F. 2d 504, certiorari denied 334 U. S. 832, "the good faith of petitioner in going over seas * * * and rendering important and essential services to the war effort cannot be questioned." but as in William B. Cruise, supra, 1063, "His actions from the time he received his Red Cross appointment clearly indicate that he belongs in the same category as other civilian workers who contributed to the war effort by accepting employment in a foreign country * * *" We view the deficiency as determined

both correctly and within the statutory period of limitation.

Decision will be entered for the respondent.

Entered: June 8, 1953.

[Endorsed]: T.C.U.S. Received June 2, 1953.

The Tax Court of the United States
Washington

Docket No. 30464

GEORGE SLAFF, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered June 8, 1953, it is

Ordered and Decided: That there is a deficiency in income and victory tax for 1943 and in income tax for the 1944, in the amounts of $356.25 and $473, respectively.

Enter: June 8, 1953.

[Seal] /s/ CLARENCE OPPER,
Judge

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 30464

GEORGE SLAFF, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR REVIEW

Comes now the Petitioner, in person, and petitions the United States Circuit Court of Appeals for the Ninth Circuit to review the decision of the Tax Court of the United States in the above matter entered on June 8, 1953, and respectfully states the following:

I.

The nature of the controversy is as to whether a deficiency in income and victory tax exists for 1943 and whether a deficiency in income tax exists for 1944.

The basic issues involved herein are:

(a) Whether the Commissioner of Internal Revenue was barred by the Statute of Limitations from assessing the alleged deficiencies herein.

(b) Assuming that the Commissoner was not so barred, whether the Petitioner was a bonafide resident of a foreign country or countries during period involved and thus exempt from taxation.

II.

This Petition for Review is filed pursuant to Sec-

tions 1141 and 1142 of the Internal Revenue Code.

Venue of the United States Circuit Court of Appeals for the Ninth Circuit is established by virtue of a Stipulation in writing, dated July 10, 1953, heretofore filed in the United States Tax Court, between the attorney for the Commissioner and the Petitioner, in person, stipulating that review may be had in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit.

Dated: August 4, 1953.

/s/ GEORGE SLAFF,
Petitioner Pro Se

NOTICE

To: Kenneth W. Gemmill, Acting Chief Counsel, Bureau of Internal Revenue, Washington, D.C.

Sir:

Please Take Notice that the undersigned has hereby applied for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court of the United States in the above captioned matter, entered on June 8, 1953, by filing the enclosed Petition for Review with the Clerk of the Tax Court of the United States.

Dated: August 4, 1953.

/s/ GEORGE SLAFF,
Petitioner Pro Se

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed August 24, 1953.

The Tax Court of the United States
Washington

[Title of Cause]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 11, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation as to Contents of Record on Review" in the proceeding before The Tax Court of the United States entitled "George Slaff, Petitioner, vs. Commissioner of Internal Revenue, Respondent", Docket No. 30464 and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 4th day of September, 1953.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States

[Endorsed]: No. 14054. United States Court of Appeals for the Ninth Circuit. George Slaff, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: September 25, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit

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In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 14054

GEORGE SLAFF, Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE, Appellee.

STATEMENT OF POINTS

Now comes the Appellant herein in person and hereby asserts the following errors which he intends to urge on review by this Court of the Decision of the Tax Court of the United States entered June 8, 1953.

1. That the Tax Court erred in finding that the Petitioner had omitted from gross income reported for the years 1943 and 1944 amounts properly includible therein which, for each of said years, are in excess of 25% of the amount of gross income stated in the respective returns.

2. That the Tax Court erred in holding that the assessment of the deficiency was not barred by the

applicable Statute of Limitations, Sec. 275(a), I.R.C. ("The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.") and in holding that the applicable Statute of Limitations was Sec. 275(c), I.R.C. ("If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed or a proceeding in court for the collection of such tax may be begun without assessment, at any time within five years after the return was filed."), and that therefore the action was not barred.

3. That the Tax Court erred in finding that the Petitioner was not a bona fide resident of a foreign country or countries during 1943 or 1944 and in failing to find that the Petitioner's income was exempt from taxation during those years.

4. That the Tax Court erred in entering its Decision wherein it ordered and decided that there is a deficiency in income and victory tax for 1943 and in income tax for 1944 in the amounts of $356.25 and $473.00, respectively.

Dated: October 2, 1953.

/s/ GEORGE SLAFF,
Appellant, Pro Se

Notice of Filing attached.

[Endorsed]: Filed Oct. 5, 1953. Paul P. O'Brien, Clerk.

No. 14054

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE SLAFF,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition to Review a Decision of The Tax Court of the United States.

BRIEF FOR APPELLANT.

GEORGE SLAFF,
6875 Pacific View Drive,
Hollywood 28, California,
Pro Se.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 14054

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE SLAFF,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition to Review a Decision of The Tax Court of the United States.

BRIEF FOR APPELLANT.

This is an appeal from a judgment of the Tax Court of the United States entered June 8, 1953, upholding deficiencies assessed against Appellant by the Collector of Internal Revenue as follows:

1943—Income and Victory Tax, $356.25

1944—Income Tax, $473.00

This appeal is taken pursuant to the provisions of Sections 1141 and 1142, Internal Revenue Code, and is before this Court pursuant to written stipulation between Appellant and Counsel for the Respondent that the decision of the Tax Court might be reviewed by this Court.

Statement of Case and Questions Involved.

This appeal presents for the first time in any Circuit Court the question of whether one who fully reports his total income on his individual tax return in the section headed "Income" or "Your Income" and, at the same time, claims that the income reported is exempt from taxation because of a specific provision of law (in this case, Sec. 116, I. R. C.) has, *in fact, omitted to report* an amount properly includible in gross income in excess of 25% of the amount of gross income stated in the return, and thus has caused the Statute of Limitations to be extended from the normal period of three years set forth in Section 275(a), Internal Revenue Code, to the exceptional five-year period provided for in Section 275(c).[1]

The other question presented is whether or not Appellant was, in fact, a bona fide resident of a foreign country or countries during the years in question and therefore exempt from taxation by reason of Section 116, Internal

---

[1]Sec. 275. Period of Limitation upon Assessement and Collection.

Except as provided in Section 276—

(a) General Rule.—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * * * * * * * *

(c) Omission from Gross Income.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time within 5 years after the return was filed.

Revenue Code. It is, of course, Appellant's position that there is no need for the Court to decide this point since the assessment was barred by the three-year Statute of Limitations.

There is no dispute as to the facts. They may be taken (with one correction which will be noted) as set forth in the Tax Court's Findings of Fact [R. 37-39], with the exception of the last two findings (not set forth here) which are the Court's Conclusions, as follows:

> "For reasons of physical disability, petitioner, an individual, was classified by his draft board as 4-F and was refused entrance into three branches of the Armed Services in which he sought to enlist. Petitioner applied for overseas service with the American Red Cross (hereinafter called 'Red Cross') and was employed by that organization in June or July, 1942. He received a leave of absence from the Federal Power Commission where he held the position of principal attorney, made a complete disposition of the real property he owned in the United States, and gave up his apartment in Washington, D. C., which was the only permanent abode or residence he had maintained in the United States up to that time.
>
> "Having applied for and received an American passport, he was ordered by the Red Cross to England in September, 1942. He flew there as a civilian passenger on a civilian airline. From October to December, 1942, he served with the Red Cross in Greenock, Scotland, and lived there with a civilian family rather than at the Red Cross quarters.

"In December, 1942, petitioner was assigned to North Africa where he served as Executive Aid or Executive Assistant to the Delegate to North Africa until October, 1943. While in North Africa he had an apartment in Algiers for a time and a house for a time.

"From October, 1943, until August, 1944, petitioner served in Naples, Italy, as Director of Food Supply for the Red Cross. For the bulk of his time there, he shared an apartment with a correspondent of the National Broadcasting Company.

"In August, 1944, petitioner was assigned to France, serving at Marseilles and Dijon until the middle of December, 1944. In Dijon, he lived in an apartment.

"In December, 1944, petitioner was returned to the United States in order to make appearances on behalf of the Red Cross. The Federal Power Commission subsequently requested petitioner to return to its service. He did so in April or May of 1945, being engaged as chief counsel in charge of a nation-wide investigation of natural gas resources, a different capacity from that which he had left in 1942.

"Petitioner's intention upon going overseas was to return to the United States after serving abroad whatever period of time might be required. He was advised by counsel that he was liable for taxes in England and France during the war, but he paid no taxes to either country.

"On April 28, 1947, petitioner filed his returns for the years 1943 and 1944 with the collector of internal revenue for the fifth district of New Jersey. He stated on the first page of his 1943 return under the heading 'Income' the following:

" 'American Red Cross—Overseas Sept. 1942 to Dec. 1944. Income received $3300; exempt under Section 116 I. R. C.; therefore no taxable income.'

"After the words 'Enter total here,' he wrote 'None.' A similar statement was made in the return for 1944."

> (*Note*—This is a correct statement with respect to the 1944 return although it should be noted that there is no heading over the column where the total is to be entered. It is correct also with respect to the 1943 return except for the fact that in the 1943 return the notation was "Total" instead of "Enter total here" and the columns where the total was to be entered were headed respectively "Column 1—Income Tax Net Income" and "Column 2—Victory Tax Net Income" and it was under these headings that Appellant wrote in each case the word "None.")

"Notice of deficiency was mailed by respondent to petitioner on June 19, 1950, more than three years after the returns were filed. No waiver extending the Statute of Limitations has been filed, entered into or made by petitioner or anyone acting on his behalf."

ARGUMENT.

POINT I.

The Claim of Exemption From Taxation of Fully Stated Income Did Not Constitute an Omission to Report.

The question involved is a very simple one. Did Appellant *omit* from his statement of gross income contained in his returns any amount properly includible therein?

In this case, the Commissioner would disturb the normal three-year statute of limitations for assessment by asserting a deficiency more than 3 years after the filing of the returns showing *on their face* Appellant's entire income, designated as "Income Received" in the Section entitled "Income" and "Your Income" respectively.

The Code allows a five-year period where the taxpayer omits to report more than 25% of his gross income (I. R. C., Sec. 275(c).) But since this constitutes an exception to the Statute of Limitations, it has been established in the leading case of *C. A. Reis,* I. T. C. 9, affd. 142 F. 2d 902 (C. C. A. 6), that the Commissioner, when relying upon this exception, has the burden of proving the basis for its application.

It is conceded that Appellant's total income in each of the two years in question was $3300—the amount stated on the face of each of his returns as "Income Received" under the headings "Income" (on the 1943 return) and "Your Income" (on the 1944 return). The Court below held that the Appellant's claim that the amount stated by him as "Income Received" was exempt from taxation "necessarily results in a failure to include that amount or in fact any amount whatever in his gross income" [R. 41].

We submit that the Court's decision is at war with the language of Section 275(c), with the purpose of Section 275(c), and with the cases which have dealt with it.

The Language of Section 275(c).

Section 275(c) uses clear language. It is entitled "*Omission* from Gross Income." The word "omit" is the key word of the section and decisive of its meaning and intent. "If the taxpayer *omits* from gross income . . ."

There is nothing mysterious about the meaning of the word "omit." It is simple and explicit, without hidden significances or obscure connotations. Webster's New International Dictionary (2d Ed., 1939) defines "omit" as "To leave out or unmentioned; to abstain from inserting or naming." This is not only its commonly understood meaning—it is its only meaning. In *Ewald v. Commissioner,* 141 F. 2d 750, 752 (C. C. A. 6), the Court defined "omit" as meaning "to disregard, to fail, forbear, neglect to mention, or to fail to insert or include."

By its use of the word "omit" Congress unmistakably limited the scope of the section to the situation of "leaving out," of "failing to mention," of "not naming." Neither in the words nor in the purpose of the section, as disclosed by its legislative history can there be found the slightest indication that Congress intended that the exception it was creating to the normal 3-year Statute of Limitations should apply to the situation where the taxpayer fully stated his total income, as such, at the place in the return set out for this purpose, even though he accompanied that statement by a claim of exemption from taxation.

That the word "omit" was, in fact, carefully and deliberately chosen by Congress is clear from the legislative history of the section.

Legislative History.

Section 275(c) was created by Congress as an execption to the long-standing, normal 3-year Statute of Limitations. It was originally a product of a subcommittee of the House Ways and Means Committee of the 73rd Congress. This subcommittee conceived of the section as a corollary to the unlimited period of assessment of taxpayers filing no returns, and in fact the House adopted its recommendation that the new provision be made a part of Section 276, relating to fraud and failure to file returns and carrying no period of limitation on assessment. The subcommittee stated in its report, issued December 4, 1933:

> "Your subcommittee is of the opinion that the limitation period on assessments should also not apply to certain cases where the taxpayer has understated his gross income on his return by a large amount, even though fraud with intent to evade tax cannot be established. It is, therefore, recommended that the statute of limitations shall not apply where the taxpayer *has failed to disclose in his return* an amount of gross income in excess of 25 percent of the amount of the gross income stated in the return. The Government should not be penalized where a taxpayer is so negligent *as to leave out items* of such magnitude from his return." (Hearings before Committee on Ways and Means, 73rd Cong., 2d Sess., p. 139.) (Emphasis supplied.)

In other words, the subcommittee viewed the leaving out of a return of items of gross income aggregating

more than 25% of the gross income reported as tantamount to filing no return, and therefore as invoking the same considerations as induced the Congress to eliminate the bar of the statute of limitations in cases of the failure to file any return: that is, the prejudice to the Commissioner of having to assess a deficiency within a limited time where the taxpayer, by not reporting his income, made it difficult for the Commissioner to discover it. Curiously, at hearings before the full Committee, the Treasury, through Roswell Magill, expressed opposition to the bill, because it felt that three years was time enough for the Government "to find out about these things, and that it is desirable at some time for a taxpayer to be able to know that his liability is closed in the absence of fraud." (*Id.* at p. 149.)

In a colloquy that ensued between Congressman Jere Cooper of Tennessee, speaking for the subcommittee, and Mr. Magill, the following was developed:

> "Cooper: What we really had in mind was just this kind of a situation: Assume that a taxpayer left out, say, a million dollars; he just forgot it. We felt that whenever we found that he did that we ought to get the money on it, the tax on it.
>
> Magill: I will not argue against you on that score.
>
> Cooper: In other words, if a man is so negligent and so forgetful, or whatever the reason is, that he overlooks an item amounting to as much as 25 percent of his gross income, that we simply ought to have the opportunity of getting the tax on that amount of money.
>
> Magill: Yes; so far as the cases you have mentioned are concerned, we would certainly agree with

you. Now, the fellow we were thinking of—and maybe we thought of him too much—is the individual who had honestly tried to include all he thought he should have, but he did not."

Following these hearings, the House Committee adopted the bill of its subcommittee with the explanation that its aim was to reach "taxpayers who are so negligent as to leave out of their returns items of such magnitude" (*i. e.,* gross income items in excess of 25% of reported gross income). (*House Ways & Means Committee Report,* H. Rep. No. 704, 73rd Cong., 2d Sess., p. 35.) Significant in this report and in the foregoing colloquy and in the subcommittee report quoted above are the references to "items" and to the "leaving out" or "overlooking" or not "including" same.

Also significant is the placing of this measure, in the original House bill, in the section relating to the filing of no return, which is only a more wholesale sort of leaving out of items of receipt. A five-year limitation was ultimately put upon the assessment of omissions of gross income in the Senate, in response to the Treasury's plea for the fellow "who had honestly tried to include all he thought he should have, but he did not." Thus, the Senate report states:

> "It is believed that in the case of a taxpayer who makes an honest mistake, it would be unfair to keep the statute open indefinitely. For instance, a case might arise where a taxpayer *failed to report* a dividend because he was erroneously advised by the officers of the corporation that it was paid out of capital or he might report as income for one year an item of income which properly belonged in another

year." (*Senate Finance Committee Report,* S. Rep. No. 558, 73rd Cong., 2d Sess., pp. 43-44.)

It is impossible to examine the history of this section without becoming convinced that it was designed to give the Commissioner a period longer than 3 years to discover income in the case of taxpayers who had failed in a substantial respect to report their income fully. All the discussion, all indicia of intent point specifically and only at the taxpayer who, to use the Committee's words, "failed to disclose," who was "so negligent as to *leave out* items of such magnitude," who "left out," who was "so negligent and so forgetful, or whatever the reason is, that he *overlooks* an item amounting to as much as 25 percent," who "failed to report."

Nowhere can there be found the slightest intimation that Congress intended that a taxpayer who fully reported his entire income on his tax return and in fact did so at the very place set forth on the return for the reporting of income and in addition, reported it as "Income Received" could make a claim of exemption from taxation only at the peril of extending the statute of limitations if his claim of exemption was denied.

Congress was making an exception to the normal statute in the case of those taxpayers whose actions, whether deliberate or otherwise, were such as either to keep the Commissioner in ignorance of their actual gross income or to make it difficult for him to discover what it was. Congress had not the slightest reason or desire to extend the statute in the case of taxpayers who fully and clearly reported the total amount of their income.

To hold, as did the Court below, that the taxpayer's claim that his fully stated income was exempt from income

tax is the equivalent of a failure to report any gross income, is to depart completely from both the plain words and the clear intent of the statute. It is also contrary to the decided cases.

The Cases.

The Court below relied upon 3 Tax Court cases as the basis for its decision. (In the case of *M. C. Parrish & Co.,* set out by the Court below as "3 T. C. 119, 130-131, affd. (C. A. 5) 147 F. 2d 284," the question of the Statute of Limitations was not raised on appeal.) Even those cases, however, as we will briefly point out later, do not support the Court's decision and, in fact, bear out appellant's position with respect to the purpose and intention of Section 275(c).

That Section 275(c) cannot be tortured into applying to the case at bar appears clearly from the very recent case of *Uptegrove Lumber Co. v. Commissioner* (C. C. A. 2), 204 F. 2d 570, decided June 29, 1953.

There, too, the Commissioner sought to apply the 5 year statute of limitations to an assessment which the taxpayer asserted was barred by the 3 year limitation of Section 275(a). The facts are set out in the Court's opinion, page 571, as follows:

> "The taxpayer is a manufacturing corporation. The present deficiency assessment grows out of the Commissioner's late discovery of legal impropriety and substantial resultant error in taxpayer's computation of its gross income in its 1944 return. In this computation, as it appeared on the face of the return, *the taxpayer first set out a correct statement of its gross sales.* From that figure it then subtracted an amount designated as 'the cost of goods sold.'

> This 'cost' was itself an aggregate of items including a reserve for retroactive wage increases pursuant to demands then pending before the National War Labor Board, but later disallowed. It is not disputed now that this contingent reserve could not lawfully be included in the cost of goods sold. On the face of its return the taxpayers subtracted this inflated cost item from correctly stated gross sales and accordingly arrived at an incorrect gross profit from sales. The error was carried forward when this stated profit was added to other income to arrive at a 'total income' figure. *The end result was an understatement of this total by more than 25%.* This understatement is the basis of the deficiency assessment made more than three years later in reliance upon the language of Section 275(c) which permits assessments within a five-year period in situations where a taxpayer 'omits from gross income an amount properly includible therein which is in excess of 25% of the amount of gross income stated in the return.'" (Emphasis supplied.)

The Court reversed the Tax Court's decision in favor of the Commissioner and held that Section 275(c) was inapplicable and the assessment was barred by the three year limitation of Section 275(a).

In its opinion, the Court carefully examined the legislative history of Section 275(c) and concluded that:

> "the history of Sec. 275(c) persuasively indicates that Congress was addressing itself to the situation where a taxpayer *shall fail to include some receipt* or accrual in his computation of gross income and not in a more general way to errors of whatever kind in their computations." *Supra,* page 572, (Emphasis supplied).

The Court's opinion is clear as can be that Congress had no intention of changing, and that the language of Section 275(c) does not change, the 3 year period of limitations with respect to the taxpayer who fully and openly reports the amount of his total income in the gross income section of his return.

To be sure, if there is an actual omission (of over 25%), the fact that the omission was made in good faith will not serve to prevent the application of Section 275(c). Nor, indeed, should it. For there the objective mischief which Congress was aiming at is present, the increased difficulty under which the Commissioner must labor in order to discover the taxpayers true income and the consequent necessity for additional time before the Commissioner's inquiry is barred.

Similarly where *someplace* in the return, other than in the gross income section, a figure appears which in fact is the amount of the full gross income but is not in the gross income section nor clearly stated to be that, Section 275(c) has properly been held to apply. For in such case, too, there is in fact present "the mischief of effective concealment by nondisclosure which the extended limitation period of Section 275(c) was designed to offset." (*Uptegrove v. Commissioner, supra,* p. 573.)

Thus, this Court in *O'Bryan v. Commissioner,* 148 F. 2d 456 (C. C. A. 9), properly held Section 275(c) to apply in that case, although the tax returns there involved did show, someplace on the returns, the total amount of taxpayer's earning. This Court, however, fully understood the reason for Section 275(c) and the evil that Congress was trying to offset. The correct basis

for the application of Section 275(c) to that case and situations like it was stated by this Court at page 459:

> "The mere appearance of the total amount of gross income *somewhere* on the face of an income tax return is not sufficient to prevent an omission within the terms of Sec. 275(c). *The government is not required to search carefully throughout a tax return to ascertain some fact which will put it on notice of error.*" (Emphasis supplied.)

This is the essence of the reason for Section 275(c) and the valid basis for holding that it applied to the taxpayer in the *O'Bryan* case. As the Tax Court had said in the *O'Bryan* case below, 1 T. C. 1137, 1146:

> "Petitioner suggests that the section should not be applied when a taxpayer has made a 'full disclosure' in his returns. The question need not be decided in this case; for in our judgment no full disclosure was made."

In the *O'Bryan* case on appeal, this Court went on to say, page 460:

> "To satisfy the terms of the section *the figure which represents gross income and from which net income is derived* must not be understated by an amount in excess of 25% of that figure. In the instant case, gross income was shown as only half the correct amount." (Emphasis supplied.)

By the very tests which this Court set down in the *O'Bryan* case, Appellant at bar cannot be held within the purview of Section 275(c).

The total amount of Appellant's gross income here did not appear merely "somewhere" on the face of his returns. It appeared—*and in full*—in the sections headed respec-

tively "Income" and "Your Income" for the two years involved. Moreover it was additionally designated by Appellant as "Income Received."

The government was "not required to search carefully" (or at all, for that matter) throughout Appellant's tax return "to ascertain some fact which will put it on notice of error." The government did not require a day after even the most casual glance at the return, let alone two years beyond the normal period of the statute of limitations, to ascertain any fact which would put it on notice that it disagreed with taxpayer's interpretation of the law regarding the taxability of his income.

The single "figure which represents gross income and from which net income is derived" in Appellant's return was not understated by as much as a nickel, let alone by 25%. It was stated at 100%—$3,300. It was stated as "Income Received." It was stated in the section headed "Income" or "Your Income." Appellant's gross income was shown not as "half the correct amount" as in the *O'Bryan* case, or as any part, less than the whole, of the correct amount, but as the full, entire, complete, whole correct amount—$3,300.

What is gross income? Insofar as is applicable here, Section 22, Internal Revenue Code, defines "gross income" as "gains, profits and income derived from salaries, wages, or compensation for personal services . . ." What did Appellant report in both his returns? His "income derived from salaries, wages or compensation for personal services" rendered for the American Red Cross. How did Appellant report this? As "Income Received." Where did Appellant report this? In the sections headed "Income" and "Your Income" for the respective years.

In reporting the amount of this income, did he "leave out or unmentioned" any part thereof? Did he "abstain from inserting or naming" any part thereof? Did he "disregard" or "fail, forbear or neglect to mention" or "fail to insert or include" any part thereof in his statement of his "income derived from salaries" from the American Red Cross? The answer can be read on the face of the returns. It is clear that *he omitted nothing.*

To be sure, if Appellant's return had merely stated "Taxpayer was employed by the American Red Cross overseas Sept. 1942—Dec. 1944 and whatever income he received is exempt from taxation under Sec. 116 I. R. C. and therefore taxpayer has no taxable income," without stating the amount of his income, then Appellant might have "omitted" to report any gross income and Section 275(c) might apply. For there, as in the *O'Bryan* case, *supra,* and in *Ewald v. Commissioner,* 141 F. 2d 750 (C. C. A. 6), and *Ketcham v. Commissioner,* 142 F. 2d 996 (C. C. A. 2), there could be said to have been an actual "failure to enter certain items of gain in the gross income sections of the returns" (*Uptegrove v. Commissioner, supra,* p. 573). But that simply was not the fact here and no amount of rationalization can turn a complete reporting into a complete omission.

The Tax Court's entire method of approach was as incorrect as its conclusion. (See *Van Bergh v. Commissioner,* 18 T. C. 518.)

There, petitioner had computed his tax and reported his income so as to avail himself of the benefits of Section 107, Internal Revenue Code, which in certain cases permits the spreading over a three-year period of the tax on income from personal services, 80% of payment for which is received in one taxable year. The Tax Court

found that although the amount in question was not stated on page One of the returns (Form 1040, as in the case at bar) it was set forth in various schedules explaining the taxpayer's tax computation. The Court pointed out, page 521, *supra*:

> "Curiously enough, there is no item on the Individual Income Tax Return Form expressed as indicating 'gross income.' *It cannot hence be argued that the mere failure to insert the figure at any designated place in the return constitutes its omission from 'gross income.'*" (Emphasis supplied.)

The Court concluded as follows, page 522, *supra*:

> "We conclude that by computing his tax and reporting his income so as to avail himself of the benefits of Section 107, petitioner did not omit from gross income any part of the compensation affected; and that accordingly not the 5- but the 3-year Statute of Limitations applies. It being concluded that the deficiency notice was issued beyond the 3-year limit, respondent's action is barred and *it becomes unnecessary to consider the substantive question whether or not petitioner was entitled to the tax computation he claimed.*" (Emphasis supplied.)

Certainly in the case at bar, Appellant was equally entitled to have the question of the statute of limitations decided independently and in advance of the substantive question of whether or not he was entitled to the tax exemption he claimed.

None of the three Tax Court cases which the Court below relied on (*M. C. Parrish & Co.*, 3 T. C. 119; *American Foundation Co.*, 2 T. C. 502; *Emma B. Maloy*, 45 B. T. A. 1104) actually support the Court's position with respect to Appellant.

Maloy was a case in which Section 275(c) was held *not* to apply.

American Foundation Co. was, like the *O'Bryan* case, *supra,* a case where there was an undisputed omission from gross income as stated in the return of an amount in excess of 25% of the amount stated, although "at some place in the return" (*supra,* p. 509), the details of the sale of the shares (not included in the amount of gross income reported) were to be found.

M. C. Parrish is the case upon which the Commissioner, and apparently the Court as well, relied most heavily. There again was a situation akin to the *O'Bryan* case where there was in fact an omission from the amount reported as gross income and where the Government should properly not have been "required to search carefully" through the return to put it on notice of all the facts of the taxpayers' true income. In the *Parrish* case, the Tax Court pointed out with respect to the two schedules in which the disputed amount was stated that "at neither place was the amount reported as 'gross income.' The term 'gross income' is defined in Sec. 22(a), *supra*" (p. 130, *supra*).

The *Parrish* case certainly cannot be held to apply where Appellant has reported his total "income derived from salaries, wages or compensation for personal services" (gross income, as defined in Sec. 22(a)), as "Income Received" and in the gross income section of the tax return.

We submit that the Tax Court was completely in error in holding that Section 275(c) applied and that, on the contrary, the deficiency assessment was barred by the three-year limitation of Section 275(a).

POINT II.

Appellant Was a Bona Fide Resident of Foreign Countries During the Years in Question, and His Income Was Therefore Exempt From Taxation.

We believe the Court need not come to a consideration of this point because the Commissioner's claim is barred by the Statute of Limitations. However, the fact is that Appellant was a bona fide resident of foreign countries during 1943 and 1944 and consequently his income was exempt from taxation.

Sections 116(a)(1) and (2), Internal Revenue Code, as amended by Section 148(a) of the Revenue Act of 1942 provide:

> "(a) EXCLUSION OF EARNED INCOME FROM FOREIGN SOURCES.—Section 116(a) relating to earned income from sources without the United States is amended to read as follows:
>
> "(a) EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.—
>
> "(1) FOREIGN RESIDENT FOR ENTIRE TAXABLE YEAR.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States
>
> . . .
>
> "(2) TAXABLE YEAR OF CHANGE OF RESIDENCE TO UNITED STATES.—In the case of an individual citizen of the United States, who has been a bona fide resi-

dent of a foreign country or countries for a period of at least two years before the date on which he changes his residence from such country to the United States, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof), which are attributable to that part of such period of foreign residence before such date, if such amounts would constitute earned income as defined in section 25(a) if received from source within the United States; . . ."

Treasury Regulation 111 (as amended by T. D. 5373, 1944, C. B. 143) provides in Section 29.116-1 as follows:

"Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4 and 29.211-5 (of the Treasury Regulations) relating to what constitutes residence or non-residence, as the case may be, in the United States in the case of an alien individual."

Section 29.211-2 of the Regulations, which is the basically controlling section, provides:

"DEFINITION.— . . .

"An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is *determined by his intention with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient.* If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for

> a definite purpose which in its nature may be promptly accomplished is a transient; but *if his purpose is of such a nature that the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. . . .*" (Emphasis supplied.)

The question of residence in a case like this is a factual one to be decided on the specific facts involved. *Bouldin v. Commissioner,* 8 T. C. 959, 967, "Residence is, of course, mainly a question of fact and each case naturally must be determined upon its own facts."

See also:

H. F. Baehre v. Commissioner, 15 T. C. 236.

Mertens Law of Federal Income Taxation, Vol. 3, Sec. 19.31, points out: "Any temporary place of abode may be a residence." "Residence" does not by any means imply or require permanence of fixed duration of stay abroad.

Now let us examine the controlling provision of Section 29.211-2 above.

> "An alien actually present in the United States (substitute 'foreign country or countries' as far as Appellant is concerned) who is not a mere transient or sojourner is a resident of the United States (foreign country or countries) . . ."

Appellant was, of course, "actually present" in the foreign countries. Was he then a mere "transient or sojourner" in those countries? Definitely not, for "whether he is a transient is determined by his intentions with regard to the matter and length of his stay."

The record is clear and uncontradicted as to Appellant's intentions with regard to "the length and nature of his stay." He intended to stay abroad in the foreign lands where he was to work and serve, "as long as I was required to remain abroad, *whether that might take a year or two years or five years;* whatever the exigencies of that particular situation might demand" [R. 22]. This was no matter of being abroad for a brief stay and quickly returning to the United States. When Appellant left the United States in September 1942, it was with the knowledge that his stay abroad was going to be a long one. The subsequent fact of his absence from the United States for well over two years bears out completely his stated intention to stay abroad for as long as he was required to stay abroad, no matter how long that might be.

The Regulation is equally clear that "a mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a 'transient.'" Clearly Appellant's intention to return to the United States, which he frankly stated on his direct examination [R. 22] "when and if" his service with the American Red Cross overseas was completed, was certainly no more than "a mere floating intention" and it was with equal certainty, "indefinite as to time."

Appellant's intentions were clearly within the purview of the Court's holding in *Swenson v. Thomas, Commissioner,* 164 F. 2d 783, 784 (C. C. A. 5).

> "*But notwithstanding the fact that he established no fixed home in Colombia, or even a settled place of abode, his work requiring him to be ever on the move,* it remains true that he was always living in

Colombia, attending to his business there; and that we think constitutes residence there.

"The Regulation above referred to makes no difficulty. It excludes 'a mere transient or sojourner' and correctly. A transient means literally 'one going across' or passing through. 'Sojourner' is built around the French word 'jour,' meaning a day, and signifies a mere temporary presence or visit. The Regulation continues: 'A mere fleeting *(sic)* intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. *If he lives in the United States (or Colombia) and has no definite intention as to his stay he is a resident.* One who comes to the United States (or Colombia) for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment and to that end the alien makes his home temporarily in the United States (or Colombia) he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned.' Under this elaborate explanation Swenson was a resident in Colombia, for his business was likely to require 'an extended stay' and did take four years. Making his 'home temporarily' in Colombia does not mean necessarily buying a house or changing his domicile. It means no more than living there temporarily, though his business requires him to move from place to place."

Even actual return to the United States during the period in question has been held not to negate bona fide foreign residence abroad where it is the taxpayer's intention to remain indefinitely until his work abroad is com-

pleted. (*Myers v. Commissioner,* 180 F. 2d 969 (C. C. A. 4).)

There the Court pointed out even (p. 971) that "an individual can have two residences" and this did not militate against its finding that the taxpayer was a bona fide resident of a foreign country for purposes of exemption from United States income tax pursuant to Section 116(a), Internal Revenue Code. Similarly the Court found such bona fide residence to exist despite the fact that the taxpayer had returned to the United States five times during the year in question.

Certainly Appellant's continued absence from the United States for well over two years without any return during that period points even more strongly to bona fide residence abroad. The Court, in the *Myers* case, pointed out that in a similar case, *Yaross v. Kraemer, Commissioner,* 83 Fed. Supp. 411, the Court there had found that eleven visits to the United States from Canada did not militate against the Court's finding that petitioner's bona fide residence was in Canada.

The Regulation continues "one who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; . . ." Neither by foresight nor by hindsight can it be asserted that the purpose which Appellant was seeking to accomplish by his service with the American Red Cross was something "which in its nature (might) be promptly accomplished." One need only think back to September, 1942, and the conditions which existed at that time, to recollect only too well that there was certainly no prospect then that Appellant's services abroad might "be promptly accomplished." And, of course, the fact is that the services

were not "promptly accomplished." On the contrary, Appellant was squarely within the scope of the balance of the sentence we have just been considering—"but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, *though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned.*"

For the accomplishment of that purpose for which an extended stay was necessary, Appellant made his home temporarily in the foreign countries where his work required him to be. Like the taxpayer in *Harvey v. Commissioner,* 10 T. C. 183, Appellant was an unmarried man [R. 31]. As that court said there (p. 189),

> "in effect, to use a colloquial expression 'his home was where he hung his hat.' Plainly, his position is broadly different from one who had a home, a wife, and children residing in the United States."

Here too, Appellant's home "was where he hung his hat." In fact the record is clear *and uncontradicted* that, prior to going abroad, Appellant had given up his home in the United States [R. 31] and had cut all his ties there, even to the extent of making a complete disposition of the real estate which he owned [R. 32, 37-38]. There was nothing in the United States which could be called Appellant's home or from which any conclusion could rightfully be drawn that Appellant was a resident of the United States during the period in question. On the contrary, Appellant made "his home temporarily" (in the words of the Regulations) in England where he lived with a private family [Tr. p. 4] and in the other countries where

he maintained either a house or an apartment [Tr. pp. 4-5].

The specific sentences of the Regulations we have been considering re-emphasize that Appellant's intention to return to the United States when his work was finished does not negate his residence abroad. If Appellant has met the tests of (1) purpose of such a nature that an extended stay abroad might be necessary for its accomplishment, and of (2) making his home temporarily abroad, then by definition "he becomes a resident (of the country or countries) though it may be his intention at all times to return to his domicile abroad (substitute 'United States' in this case) when the purpose for which he came has been consummated or abandoned."

In *Yaross v. Kraemer, Commissioner, supra,* 83 Fed. Supp. 411, the Court pointed out (p. 412) many differences of fact from *Downs v. Commissioner,* 166 F. 2d 504, in which this Court found unfavorably to taxpayer's claims of residence abroad. An examination of the record herein in comparison with the *Downs* case will similarly disclose the same degree of difference in facts which require a finding favorable to Appellant's claim of bona fide residence abroad.

In this connection, we call the Court's attention also to *White v. Hofferbert, Commissioner,* 88 Fed. Supp. 457. There the Court pointed out (p. 466), that in the *Downs* case the taxpayers

> "were handled, controlled and restricted much the same as military personnel. It is obvious that their situation was vastly different from that of the taxpayer in this case whose employment for service abroad was of indefinite duration while that of the taxpayer in the *Downs* case was strictly limited."

Similarly, the record below is clear that petitioner herein was not "handled, controlled and restricted much the same as military personnel." On the contrary, petitioner left the United States not under military or quasi-military orders, but as a civilian under an American passport [R. 20 and 38]. He traveled on a civilian airline [R. 20 and 38]. And wherever he went, England, North Africa, Italy or France, petitioner lived not in military or quasi-military quarters but in a home or a house or an apartment of his own [R. 21, 22 and 38]. Again, as the Court pointed out in the *White* case, the duration of the taxpayer's employment for services abroad, in *Downs*, was strictly limited, while that of petitioner herein with the American Red Cross "was of indefinite duration."

It is unnecessary to recapitulate each aspect of the facts herein, but it seems clear that by every test of logic, of applicable principle of the Regulations and of the basic elements in the decided cases, Petitioner was a bona fide resident of a foreign country or countries from September, 1942 to December 22, 1944, and thus pursuant to Section 116(a)(1) and (2), Internal Revenue Code, exempt from payment of income tax during the period in question herein.

Conclusion.

It is submitted that the Court below was in error, both as to the period of the Statute of Limitations and as to the question of whether Appellant was a bona fide resident of a foreign country or countries pursuant to Section 116 and the applicable regulations, and that on either ground the decision of the Tax Court should be reversed.

Respectfully submitted,

GEORGE SLAFF,

Pro Se.

No. 14054

IN THE

United States Court of Appeals For the Ninth Circuit

GEORGE SLAFF, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The memorandum opinion of the Tax Court (R. 40-43) is not officially reported.

JURISDICTION

The petition for review (R. 44-45) involves a deficiency in federal income tax and victory tax for the year 1943 and in federal income tax for 1944 in the amounts of $356.25 and $473, respectively. (R. 43.) [1]

[1] The year 1942 is also involved by reason of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126.

Taxpayer's returns for both 1943 and 1944 were filed on April 28, 1947, with the Collector of Internal Revenue for the Fifth District of New Jersey. (R. 39.) On June 19, 1950, the Commissioner of Internal Revenue mailed a notice of deficiency to the taxpayer advising of a total deficiency of $982.61. (R. 6-13.)[2] Within 90 days thereafter, on September 8, 1950, the taxpayer filed a petition for redetermination of the deficiency under Section 275 of the Internal Revenue Code. (R. 1-13.) On June 8, 1953, the Tax Court entered a decision finding a deficiency in income and victory tax for the year 1943 in the amount of $356.24 and in income tax for 1944 in the amount of $473. (R. 43.) The case is brought to this Court by a petition for review filed by the taxpayer on August 24, 1953. (R. 44-45.) Jurisdiction of this Court is invoked under the provisions of Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948. Venue is established by a written stipulation dated July 10, 1953,[3] agreeing that the decision of the Tax Court may be reviewed by this Court.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly held that during the taxable years 1943 and 1944 taxpayer was not a *bona fide* resident of a foreign country or countries within the meaning of Section 116(a), Internal Reve-

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[2] Included in the amount of this deficiency was a deficiency in income tax for the year 1945 in the amount of $153.36, which is not in issue in this proceeding.

[3] This stipulation is not included in the printed record but forms part of the transcript of record on appeal.

nue Code, and, accordingly, that the income he earned in those years is not exempt from taxation.

2. Whether the Tax Court correctly held that the claim to exemption from taxation by the taxpayer resulted in an understatement of his gross income by more than twenty-five percent of the amount stated in the return, so that the five-year period for assessment and collection is applicable as provided in Section 275(c), Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Regulations are set forth in the Appendix, *infra.*

STATEMENT

The uncontroverted facts as testified to by the taxpayer (R. 18-36) and as found by the Tax Court (R. 37-40) may be summarized as follows:

When taxpayer was classified by his draft board as 4-F, and he was not permitted to enlist in the armed services, he applied for overseas service with the American Red Cross, and was employed by that organization in June or July, 1942. He did not resign from the Federal Power Commission, where he was principal attorney, but obtained a leave of absence. He transferred real property in his name to his brother, and gave up his apartment in Washington, D. C., which was the only permanent residence taxpayer had maintained in the United States up to that time. (R. 30-32, 37-38.)

On orders of the Red Cross, taxpayer flew to England as a civilian passenger on a civilian airline, with

an American passport. From October to December, 1942, he served with the Red Cross in Greenock, Scotland, where he roomed with a private family. From December, 1942, to October, 1943, he was assigned to North Africa as executive aide or executive assistant to the delegate to North Africa. While in Algiers he had an apartment for a time and a house for a time. From October, 1943, to August, 1944, taxpayer served in Naples, Italy, as director of food supply for the Red Cross, where he shared an apartment with a correspondent of the National Broadcasting Company. From August to December, 1944, taxpayer was assigned to France, serving at Marseilles and Dijon. In Dijon he lived in an apartment. (R. 38.)

In December, 1944, taxpayer was returned to the United States to make appearances on behalf of the Red Cross. He left the employ of the Red Cross in April or May, 1945, when the Federal Power Commission requested taxpayer to return to its service, and he became chief counsel in charge of a nation-wide investigation of natural gas resources, a different capacity from that in which he had served before. (R. 38-39.)

When taxpayer went overseas, he intended to return to the United States after serving abroad whatever period of time might be required. He was advised by counsel that he was liable for taxes in England and France during the war, but he paid no taxes to either country. (R. 39.)

Taxpayer stated on the first page of his 1943 return under the heading "Income" (R. 25):

> American Red Cross—Overseas Sept. 1942 to Dec. 1944. Income received 3300; exempt under section 116 I.R.C.; therefore no taxable income.

After the word "Total" he wrote "None." A similar statement was made in the 1944 return. (R. 25-27, 39.)

The notice of deficiency was mailed to taxpayer June 19, 1950, more than three years after the returns were filed. Neither taxpayer nor anyone acting on his behalf filed any waiver extending the statute of limitations. The Tax Court held that taxpayer was not a bona fide resident of a foreign country or countries during either 1943 or 1944. The Tax Court held further that taxpayer omitted from gross income reported for 1943 and 1944 amounts properly includible therein in excess of twenty-five percent of the amount of gross income stated in the returns, thus applying the five-year statute of limitations under Section 275(c), Internal Revenue Code. From that decision taxpayer has appealed to this Court. (R. 39-40, 43, 44-45.)

SUMMARY OF ARGUMENT

1. Since taxpayer was not a *bona fide* resident of a foreign country or countries during the taxable years 1943 and 1944, his income, earned abroad during service with the American Red Cross, is not exempt from federal income tax. The legislative history of Section 116(a), Internal Revenue Code, shows that Congress, in exempting the income of a *bona fide* resident of a foreign country from taxation, meant more than one who is physically absent from the country. There is no showing that taxpayer maintained a real home and

assumed any obligations of a home in a foreign country, including the payment of taxes. Taxpayer admitted that he paid no taxes abroad and that he had always intended to return as soon as his Red Cross assignment was terminated. He had no history of long foreign service, and had not even resigned his prior position as a Government attorney, but only obtained a leave of absence. Taxpayer's status abroad was similar to that of war and defense workers, and the courts have uniformly held that such workers do not qualify as *bona fide* residents of a foreign country. In the light of the record, it is clear that the Tax Court was justified in finding that he was not a *bona fide* resident of a foreign country within the meaning of Section 116(a) of the Code and that his income in 1943 and 1944 was subject to taxation.

2. The deficiencies for 1943 and 1944 are not barred by the statute of limitations, since, although the notice of deficiency was mailed more than three years from the date on which taxpayer's returns were filed, the five-year period of limitations applies, expressed in Section 275(c), Internal Revenue Code. The legislative history of Section 275(c) shows that Congress intended it to apply to a case such as this where a taxpayer had omitted from gross income amounts properly includible therein in excess of twenty-five percent of the amount of gross income stated in the returns. Although taxpayer stated the amount he received overseas on the face of the returns, cases decided by this and other courts show that the mere presence of the amount received on a return does not amount to a re-

porting of the amount as taxable gross income. By the disclosure of the amount taxpayer earned, coupled with the claim of exemption, he did not report such sum as taxable gross income within the meaning of the statute. The Tax Court was correct in finding that he failed to report any gross income, and that he omitted from gross income reported for 1943 and 1944 amounts properly includible therein in excess of twenty-five percent of the amount of gross income stated in the returns. Therefore, the five-year statute of limitations contained in section 275(c), Internal Revenue Code, was properly applicable, and the notice of deficiency was mailed within the permissible period.

ARGUMENT

I

TAXPAYER WAS NOT A BONA FIDE RESIDENT OF A FOREIGN COUNTRY OR COUNTRIES DURING EITHER 1943 OR 1944

The Tax Court found that the taxpayer failed to show that he was a *bona fide* resident of a foreign country or countries during 1943 or 1944, and thus that his salary, earned for services with the American Red Cross performed in Scotland, North Africa, Italy, and France, was not exempt from federal income tax under Section 116(a)(1) of the Internal Revenue Code (Appendix, *infra*). The taxpayer has appealed, contending that under the facts the finding that he was not a resident is erroneous. (R. 48.) It is our position that the finding is fully supported by the record, applying the tests of residence supplied by the statute, the controlling Regulations, and the applicable decisions.

A. The Applicable Legal Principles

The exemption granted by Section 116(a) of the Code was first enacted in the Revenue Act of 1926, c. 27, 44 Stat. 9, as Section 213(b)(14). It was there extended to a person who was a "*bona fide* non-resident" of the United States for more than six months during the taxable year. This new provision was referred to as the "foreign trade exemption" and was intended to stimulate foreign trade. H. Rep. No. 1, 69th Cong., 1st Sess., p. 7 (1939-1 Cum. Bull. (Part 2) 315, 320); S. Rep. No. 52, 69th Cong., 1st Sess., pp. 20-21 (1939-1 Cum. Bull. (Part 2) 332, 348); H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 2 (1939-1 Cum. Bull. (Part 2) 361, 364).

The Senate amendments introduced into the language of the section the words " a *bona fide* nonresident of the United States" The debate of the amendment on the floor of the Senate shows that the exemption was intended to be accorded to persons physically absent from the United States for more than six months of the taxable year. See 67 Cong. Record, Part 4, p. 3781. In the light of the legislative history of the section, the Internal Revenue Service interpreted it to mean that residence in a foreign country was not necessary to the exemption from taxation. Mere physical absence from the United States for more than six months was sufficient. I.T. 2286, V-1 Cum. Bull. 52 (1926); S.M. 5446, V-1 Cum. Bull. 49 (1926); I.T. 2293, V-2 Cum. Bull. 33 (1926); G.C.M. 9848, X-2 Cum. Bull. 178 (1931); G.C.M. 22065, 1940-1 Cum. Bull. 100. See *Downs* v. *Commissioner,* 166 F. 2d 504, 507, 508 (C.A. 9th), certiorari denied, 334 U.S. 832.

The Commissioner of Internal Revenue applied this test from 1926 until 1942, when the section was amended, and the test applied by the Commissioner was upheld and applied in *Commissioner* v. *Swent,* 155 F. 2d 513 (C.A. 4th), certiorari denied, 329 U.S. 801; *Commissioner* v. *Fiske's Estate,* 128 F. 2d 487 (C.A. 7th), certiorari denied, 317 U.S. 635; and *Swent* v. *United States,* 162 F. 2d 710 (C.A. 9th). As was pointed out in *Commissioner* v. *Swent, supra,* p. 515, the word "resident" and its antonym "resident" are very slippery words, which have many and varied meanings, and the court construed the term 'nonresident" in the statute before it as requiring "actual physical absence from the United States for six months during the taxable year."

The statute was changed in 1942. Section 148 of the Revenue Act of 1942, c. 619, 56 Stat. 798, amended Section 116(a) of the Internal Revenue Code to grant an exemption from federal income taxes to a citizen of the United States who "establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year." This change came about in this way.

The bill passed by the House of Representatives eliminated the exemption entirely. Then hearings were held by the Senate Committee on Finance with respect to the repeal of Section 116(a). We believe that a statement by the Chairman of the Senate Committee on Finance in the course of these hearings is revealing of the intent of the Committee which wrote the 1942 amendment. Senator George stated (1 Senate Hearings on H.R. 7378, 77th Cong., 2d Sess., p. 743):

> Maybe we might shorten your testimony here on this point with this statement: I think it is recognized that the complete elimination of Section 116 (a) was not really intended, that it was not the primary purpose in the case of the bona fide, nonresident American citizen *who established a home and maintains his establishment and is taking on corresponding obligations of the home in any foreign country, but there is some need for treatment of this section, so that the technicians, American citizens who are merely temporarily away from home could be properly reached and dealt with for taxation purposes.* [Italics supplied.]

In the bill reported by the Senate Committee on Finance was inserted the provision which was subsequently enacted. It provided that the exemption should be extended to a citizen who "establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year." The Senate provision was explained in S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 54, 116 (1942-2 Cum. Bull. 504, 505, 591), as follows:

> Under Section 116(a) of the Internal Revenue Code a citizen of the United States residing outside the United States more than 6 months during the taxable year is exempt from tax on his earned income from sources outside of the United States, except in the case of income paid by the United States or any of its agencies. This provision of the present law has suffered considerable abuse in the

case of persons absenting themselves from the United States for more than 6 months simply for tax-evasion purposes. To stop this abuse, the House bill repealed section 116(a).

From cases brought to your committee's attention, the complete elimination of this section would work a hardship in the case of citizens of the United States who are bona fide residents of foreign countries. For example, many employees of American business in South America do not return to the United States for periods of years. *Such persons are fully subject to the income tax of the foreign country of their residence.* [4] Your committee has adopted a provision which it is believed will effectively terminate the abuse of this section but at the same time will not unduly penalize our

[4] The reference here is to testimony of several witnesses who were American citizens resident in various countries of Latin America for many years. Their testimony in summary was that Americans residing in those countries were fully subject to all taxes imposed by the countries; that the indirect taxes paid, for which the United States citizen received no benefits, were in general more burdensome and heavy than the income tax which was comparatively new in most of the Latin American countries; that although under Section 131 of the Code there would be a credit against United States income tax of the foreign income taxes paid, there was no credit allowed for other foreign taxes; and accordingly that a United States income tax on a foreign resident paying taxes to the foreign country would unduly burden him, particularly since in the foreign country he had to expend considerable additional sums to finance schools and hospitals to provide education and medical care for his family to accord with United States standards. See 1 Senate Hearings on H.R. 7378 (Revenue Act of 1942), 77th Cong., 2d Sess., pp. 743-775, and particularly pp. 744, 745, 746, 749, 752, 757, 760, 766, 775.

citizens who are bona fide residents of foreign countries. * * *

* * * *

In lieu of the repeal of this section, your committee recommends that subsection (a) be amended so as to change the tests there provided to one of residence in a foreign country or countries during the entire taxable year. In the application of such provision, the tests as to whether a taxpayer is a resident of a foreign country or countries will be those generally applicable in ascertaining whether an alien is a resident of the United States. * * * [Italics supplied.]

The House receded from its position and the Senate amendment was accepted. H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 44 (1942-2 Cum. Bull. 701, 708).

Thus, as the statutory language and these excerpts from the hearings and the Committee Reports show, the amended section imposed a new test. The emphasis no longer is upon mere nonresidence, i.e., physical absence from this country. The determinative factor is a showing of a *bona fide* residence in a foreign country, and as the legislative statements indicate, residence there means the maintenance of a real home establishment by a long time foreign resident who assumes the obligations of a home in a foreign country, including the payment of taxes. In accord with the Senate Report's statement that the applicable tests for residence are to be the tests for determining whether an alien is a resident of the United States, Section 29.116-1 of

Treasury Regulations 111 (Appendix, *infra*) provides that in general the question of residence under Section 116(a) is to be determined by appyling the principles of Sections 29.211-2, 29.211-3, and 29.211-4 (all Appendix, *infra*) relating to what constitutes residence or nonresidence in the United States of an alien individual. Of these, Section 29.211-2 contains the provisions here pertinent.

Translating Section 29.211-2 of Treasury Regulations 111 (relating to aliens in the United States) so that it relates to the converse situation here under Section 116(a), it provides that a United States citizen actually present in a foreign country who is not a transient or sojourner is a resident of such foreign country for the purposes of the income tax, and "Whether he is a transient is determined by his intentions with regard to the length and nature of his stay." Under the Regulations, as here pertinent, a citizen is not a transient if he has a mere floating intention, indefinite as to time, to return to the United States, but he is a resident (1) if he lives in a foreign country and has no definite intention as to his stay, and (2) if his purpose in going to the foreign country is of such a nature that an extended stay may be necessary for its accomplishment *and* to that end he makes his home there temporarily even though he may intend to return to his domicile in the United States when the purpose for which he came has been consummated or abandoned.

It is important to observe that the Regulations state as a test for *bona fide* residence not only that the taxpayer must intend to stay indefinitely or for a long time in the foreign country, but also that he must live and

make his home there for the period of his stay. Thus, the Regulations' tests are in accord with the intention of Congress as discussed above.

B. The Record Fully Supports the Tax Court's Findings

In the light of the legislative history of the statute, and the wording of the Regulations, as discussed above, it is clear that the record here clearly supports the finding of the Tax Court that taxpayer was not a *bona fide* resident of Scotland, North Africa, Italy, and France from October, 1942, to December, 1944.

There is nothing in the record to show that the taxpayer established or maintained a home or took on the obligations of a home in any of the foreign countries where he briefly worked. Although he arranged for his own living quarters, his stituation was essentially that of other war workers who were subject to transfer on short notice, and who had no intention to remain permanently, but to return to their homes as soon as their work was finished.

As already indicated, the Regulations prescribe that a citizen must be one who "lives" and "makes his home temporarily" in the foreign country to be entitled to exemption. It is plain that the Regulations use these terms in harmony with the Congressional understanding as reflected in the legislative statements already quoted. Indeed, in *Downs* v. *Commissioner, supra,* (pp. 508-509), this was specifically recognized by this Court and the phrase "make one's home temporarily" in the foreign country was said to mean identifying oneself in some degree with its customs and living under and within such customs. This Court obviously also attrib-

uted the same meaning to the word "lives" in the Regulations. It can hardly be said that the taxpayer identified himself with or lived under and within the customs enforced by any of the countries in which he was a Red Cross worker. During the taxable years he remained in one place only from less than three to approximately ten months, and lived in four different countries.

Inasmuch as taxpayer did not live in any one foreign country for an entire taxable year, he appears to rely upon Section 116(a)(2) of the Code and seeks to establish at least two years' foreign residence. This means that he is asking the Court to find that he was a *bona fide* resident of Great Britain, North Africa (presumably French Morocco), Italy and France, all within a period of twenty-four to twenty-six months.

Taxpayer did not pay taxes to any foreign country during his overseas service, although he was advised by counsel that he owed taxes. (R. 23.) The nonpayment of taxes is a factor of great significance. The Senate Report quoted above indicates that Section 116(a)(1) was designed to protect United States citizens who are resident in a foreign country for periods of years and who are subject to the income tax of that country, and in accord with this purpose the courts have attached weight to the payment of foreign taxes. Thus, in *Harvey* v. *Commissioner,* 10 T.C. 183, 189-190, the Tax Court stated:

> He filled out forms for payment of taxes in Colombia, and the company paid the tax and charged him with it. We regard this one of facts properly to

be considered in examination of the question. We considered it in the *Johnson* case, *supra.* [*Johnson* v. *Commissioner,* 7 T.C. 1040, 1046, 1048.] *Amici curiae* have favored us with a thorough though somewhat repetitive brief directed in part against the idea that payment or nonpayment of taxes abroad is evidential as to foreign residence, yet the brief discloses that the Senate committee report pointed out the subjection of foreign residents to income taxes. That deduction or credit against tax is granted United States citizens for income taxes (and war profits taxes and excess profits taxes) paid foreign countries, under section 131(a)(1), Internal Revenue Code, by no means eliminates tax payments to foreign countries from consideration, on the question of foreign residence. Other foreign taxes, direct or indirect, not the subject of credit or deduction, were considered on this subject by Congress in 1942, evidence of payment of taxes being introduced. Congressional Hearings, Senate Finance Committee, Revenue Act of 1942, pp. 744-746. Though of course not conclusive, we regard the point of taxes paid one to be weighed in determining foreign residence. They were paid by the petitioner. Though it is true that the basis of tax by Colombia was not necessarily residence, the payment, in view of Congress in passage of the act, had significance, and we so consider. It was not the act of a transient, and it is consistent with residence.

Also in *Swenson* v. *Thomas,* 164 F. 2d 783 (C.A. 5th), the payment of Colombian taxes by a geologist long in foreign service unrelated to the war was noted as a factor tending to show residence, and in *Jones* v. *Kyle,* 190 F. 2d 353 (C.A. 10th), certiorari denied, 342 U.S. 886, the nonpayment of Arabian taxes by a United States citizen temporarily present in Arabia on a construction job was mentioned as one factor negativing residence. Cf. *Chidester* v. *United States,* 82 F. Supp. 322, 336 (C. Cls.).

Taxpayer was engaged only in war work for the Red Cross, and had no history of long foreign service in American business apart from this single tour of duty. He was simply temporarily away from his home in the United States, and, according to Senator George's statement, is not entitled to the exemption afforded foreign residents. The fact that he was a war worker under the protection of the American authorities, doubtless with many special privileges not accorded to the citizens of the countries in which he was working, precludes any conclusion that he was establishing a home and living under and within the customs of those countries. Taking into account all the circumstances, it is plain that, athough taxpayer was physically present in four foreign countries during 1943 and 1944, he did not establish and maintain a home there in the sense which Congress contemplated.

In harmony with this view the courts have uniformly held in varying factual situations that war and defense workers do not qualify as *bona fide* residents of a foreign country. See *Downs* v. *Commissioner,* 166 F. 2d 504 (C.A. 9th), certiorari denied, 334 U.S. 832;

Johnson v. *Commissioner,* 7 T.C. 1040; *Love* v. *Commissioner,* 8 T.C. 400; *Chapin* v. *Commissioner,* 9 T.C. 142; *Cruise* v. *Commissioner,* 12 T.C. 1059; *Thorsell* v. *Commissioner,* 13 T.C. 909; *Weeks* v. *Commissioner,* 16 T.C. 248. Cf. *Jones* v. *Kyle, supra.* Conversely, in other cases where the taxpayer has not been engaged merely in war work, but has had a history of foreign service for his employer and has otherwise shown the elements of residence, his status as a bona fide resident of a foreign country has been upheld. *Seeley* v. *Commissioner,* 186 F. 2d 541 (C.A. 2d); *Swenson* v. *Thomas, supra; Myers* v. *Commissioner,* 180 F. 2d 969 (C.A. 4th); *White* v. *Hofferbert,* 88 F. Supp. 457 (Md.); *Wood* v. *Glenn,* 92 F. Supp. 1 (W.D. Ky.); *Rose* v. *Commissioner,* 16 T.C. 232.

Taxpayer's situation was identical with that of the taxpayer in *Cruise* v. *Commissioner, supra.* There, the taxpayer, who held an identical position, and under the same terms, conditions, and restrictions as the taxpayer here, so far as we are advised, lived practically all of the time in England, and testified that he had considered remaining there. The Tax Court found he was not a *bona fide* resident of a foreign country, stating (p. 1063):

> His actions from the time he received his Red Cross appointment clearly indicate that he belongs in the same category as other civilian workers who contributed to the war effort by accepting employment in a foreign country for the duration of the war or a shorter period and after its termination returned to the United States.

The pertinent Regulations state that one is a resident if he has no definite intention as to his stay and if he lives, i.e., makes his home, in the foreign country. Here the taxpayer not only did not make his home in any of the countries in which he temporarily worked, but he had a very definite intention as to his stay. It is important that he did not even resign his position in Washington, but merely took a leave of absence. In fact, he freely admitted that at all times he intended to return. He stated (R. 22):

> And I might state, because I think it is relevant, obviously, and I think it should be stated, that my intention was not to remain away from the United States permanently. My intention—I wish to make it clear, in all fairness—my intention was to return to the United States when and if, I might say, my service with the American Red Cross overseas was completed.
>
> I intended, however, and did intend to remain abroad as long as I was required to remain abroad, whether that might take a year or two years or five years; whatever the exigencies of that particular situation might demand.

Again, on cross-examination, the taxpayer stated (R. 32):

> Q. It was your intention to return to the United States when your tour of duty overseas was finished?
>
> A. Let me put it this way: It was my hope to return to the United States. Yes, certainly, I in-

tended to return to the United States if I was physically able to do so.

Thus, although the taxpayer's service was indefinite as to time, it was specific in that he was there for only one purpose, to perform the temporary war duties assigned to him by the Red Cross, for which he had obtained a temporary leave of absence. Cf. *Downs* v. *Commissioner, supra,* where Downs' contract was indefinite as to time but he intended to stay in the British Isles for the period required to perform his duties in the construction of aircraft depots under the contract between the United States Government and Lockheed Aircraft Corporation.

Taxpayer contends that his purpose in going overseas was of such a nature that an extended stay might be necessary for its accomplishment. (Br. 26.) But that would not be sufficient to qualify him as a resident within the meaning of the statute as interpreted by the Regulations. The sentence of the Regulations embodying this thought states as a further condition that to that end he must have made his home temporarily in the foreign country. As has been shown, taxpayer did not satisfy this requirement, and therefore he was not a resident under this sentence of the Regulations, any more than under any other.

The cases on which taxpayer relies (Br. 23-27) are all distinguishable on their facts. They are cases in which the individuals involved were not war workers, but long-time foreign service employees of a business corporation with a background of service abroad for a considerable period of years as in *Swenson* v. *Thom-*

as, supra, and *White* v. *Hofferbert, supra.* In *Myers* v. *Commissioner, supra,* the question was as to the precise time at which Myers formed the intention to become a permanent resident of the Bahamas. The court held that the intention was formed near the end of 1942, rather than in 1943 as the Tax Court had held, and thus that Myers was a bona fide resident of Nassau throughout 1943. There was no question that Myers became a bona fide resident, since he moved his family to Nassau, sold his house in the United States, applied to his United States employer for retirement and a pension, and accepted employment with a Nassau corporation. As stated, the only question was as to the time when he became a resident. The court there did not interpret the word "resident" in the statute and Regulations as meaning mere physical presence.

Therefore, it is submitted that the Tax Court's finding that under the evidence taxpayer was not a bona-fide resident of a foreign country or countries during 1943 and 1944 is clearly correct.

II

THE DEFICIENCIES FOR 1943 AND 1944 ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

Taxpayer's income tax returns for 1943 and 1944 were filed on April 28, 1947. The Commissioner's notice of deficiency was mailed on June 19, 1950. Taxpayer contends (Br. 6-19) that the statute of limitations had expired at the time the notice of deficiency was mailed. This depends on which part of Section 275, Internal Revenue Code (Appendix, *infra*), is applicable. If the three-year period of limitations provided in subsection (a) applies, assessment of deficien-

cies was barred. But the Tax Court held, correctly we think, that the five-year statute of limitations provided in subsection (c) applies, so that the notice of deficiency was mailed well within the permissible time.

The question is simply whether, pursuant to the provisions of subsection (c), the Commissioner may assess deficiencies—more than three but less than five years after the filing of the taxpayer's returns—from a taxpayer who improperly claims an exemption from taxation of his entire income, thereby understating his gross income by more than twenty-five percent of the gross income actually stated on the return. It is our position that the Tax Court correctly held that the taxpayer omitted from gross income reported for the years 1943 and 1944 amounts properly includible therein which for each of said years are in excess of twenty-five percent of the amount of gross income stated in the respective returns.

Section 275(c) of the Code provides that if the taxpayer omits from gross income an amount properly includible therein which is in excess of twenty-five percent of the amount of gross income stated in the return, the period of limitations applying to assessment or collection is extended to five years. Taxpayer here stated in the space provided in the returns for listing the source of his income (R. 25)—

> American Red Cross—Overseas Sept. 1942 to Dec. 1944. Income received 3300; exempt under section 116 I.R.C.; therefore no taxable income.

In the space provided for entering the amount of gross income in figures, taxpayer wrote "None". Taxpayer

seeks to remove himself from the effect of the statute by apparently contending that he has included in gross income the full amount of the income received since he has written the figure $3,300 on the face of the return, although he claimed a total exemption, extending into the total income figure nothing at all. Under the plain words of the statute there can be no doubt that the taxpayer has understated his gross income in each return by $3,300.

The taxpayer's brief (Br. 8-12) leaves an erroneous impression of the legislative history of subsection (c). Both the legislative history and the adjudicated cases conclusively demonstrate that the five-year limitation period is clearly applicable to the instant case. The provisions of subsection (c) of Section 275 first appeared in Section 275(c) of the Revenue Act of 1934, c. 277, 48 Stat. 680. The bill originating in the House changed Section 276 of the Revenue Act of 1932, c. 209, 47 Stat. 169, relating to false or no returns and carried no period of limitations. The reason for the provision was stated in a sub-committee report published as part of the House Hearings before the Committee on Ways and Means, 73d Cong., 2d Sess., Revenue Revision of 1934, p. 139, as follows:

> Section 276 provides for the assessment of the tax without regard to the statute of limitations in case of a failure to file a return or in case of a false or fraudulent return with intent to evade tax.
>
> Your subcommittee is of the opinion that the limitation period on assessments should not apply to certain cases where the taxpayer has *under-*

> *stated his gross income* on his return by a large amount, even though fraud with intent to evade tax cannot be established. It is, therefore, recommended that the statute of limitations shall not apply where the taxpayer has failed to disclose in his return an amount of gross income in excess of 25 percent of the amount of the gross income stated in the return. The Government should not be penalized when a taxpayer is so negligent as to leave out items of such magnitude from his return. [Italics supplied.]

The full Committee adopted this reasoning as part of its report, published in H. Rep. No. 704, 73d Cong., 2d Sess., p. 35 (1939-1 Cum. Bull. (Part 2) 554, 580).

The Finance Committee of the Senate incorporated the modification in the same language into Section 275, except that it provided for a five-year period of limitations. It was this provision that was finally enacted into law. In its report (S. Rep. No. 558 (73d Cong., 2d Sess., pp. 43-44 (1939-1 Cum. Bull. (Part 2) 586, 619)) the Committee said:

> The present law permits the Government to assess the tax without regard to the statute of limitations in case of failure to file a return or in case of a fraudulent return. The House bill continues this policy, but enlarges the scope of this provision to include cases wherein the taxpayer *understates gross income* on his return by an amount which is in excess of 25 percent of the gross income stated in the return. Your committee is in general accord with the policy expressed in this section of the

> House bill. However, it is believed that in the case of a taxpayer who makes an honest mistake, it would be unfair to keep the statute open indefinitely. For instance, a case might arise where a taxpayer failed to report a dividend because he was erroneously advised by the officers of the corporation that it was paid out of capital or he might report as income for one year an item of income which properly belonged in another year. Accordingly, your committee has provided for a 5-year statute in such cases. [Italics supplied.]

See H. Conference Rep. No. 1385, 73d Cong., 2d Sess., p. 25 (1939-1 Cum. Bull. (Part 2) 627, 634).

It is clear that the Congressional intent was to fix a longer period of limitations where *gross income is understated* by more than twenty-five percent of the amount actually stated in the return regardless of the care and good faith of the taxpayer or how honest his mistake. *Ewald* v. *Commissioner,* 141 F. 2d 750, 753 (C.A. 6th). The House Report shows that the provisions of Section 275(c) were to take care of cases where the taxpayer, "*understates* gross income on his return by an amount which is in excess of 25 percent of the gross income stated in the return." [Italics supplied.] It is not enough that somewhere in the return there appears a figure which should have been correctly incorporated in the amount of gross income stated.

As this Court stated in *O'Bryan* v. *Commissioner,* 148 F. 2d 456, 459-460:

> The mere appearance of the total amount of gross income somewhere on the face of an income

> tax return is not sufficient to prevent an omission within the terms of § 275(c). The government is not required to search carefully throughout a tax return to ascertain some fact which will put it on notice of error. It is apparent from the pertinent legislative history that care and good faith on the part of a taxpayer will not prevent the applicability of subsection (c). *Ewald* v. *Commissioner of Internal Revenue,* 6 Cir., 1944, 141 F. 2d 750, 753. To satisfy the terms of the section, the figure which represents *gross income* and from which net income is derived *must not be understated* by an amount in excess of 25 per cent of the figure. [Italics supplied.]

The Tax Court significantly pointed out (R. 40) that the exact question before the Court here had been decided adversely to the taxpayer's contention in *M. C. Parrish & Co.* v. *Commissioner,* 3 T.C. 119, 130-131, affirmed, 147 F. 2d 284 (C.A. 5th), where the taxpayer had reported in an attached schedule receipt of a certain amount as "Interest collected on State of Texas obligations", but did not return the amount as "Gross Income". The Court stated (pp. 130-131):

> In *Emma B. Maloy,* 45 B.T.A. 1104, we had occasion to construe the term "gross income" as used in section 275(c) of the Revenue Act of 1934, which section is identical with section 275(c) of the Revenue Act of 1936. In the course of our opinion we said:
>
> > * * * We think it evident that the term "gross income" as used in section 275(c), *supra,* refers

to the statutory gross income required to be reported on the return. The heading, "Gross Income", on the form of the return calls for the inclusion there only of gross taxable income. That amount does not include that portion of capital gain which is not to be taken into account in computing taxable income, nor does it include nontaxable interest on Government securities. Section 275(c) refers to the omission from gross income of an amount "properly includible therein" * * *.

* * * *

Petitioner did not report the amount of $15,512.52 as gross income under section 22(a); it reported the amount as an *exclusion* from gross income under section 22(b)(4). Although an amount may be disclosed fully on the return, if it is not reported as a part of the gross taxable income, it is not a part of the "gross income stated in the return" as that phrase is used in section 275(c), *supra*. *Emma B. Maloy, supra; Estate of C. P. Hale,* 1 T.C. 121; *American Liberty Oil Co.,* 1 T.C. 386; *Katharine C. Ketcham,* 2 T.C. 159; *American Foundation Co.,* 2 T.C. 502. * * * We hold that petitioner omitted from its "gross income stated in the return" the amount of $15,512.52. The amount of "gross income stated in the return" was $11,426.94. Since the amount omitted from gross income was properly includible therein, and since this amount is in excess of 25 percent of the amount of gross income stated in the return, it follows

that the deficiencies for the year 1937 are not barred by the statute of limitations.

Applying the reasoning of the *Parrish* case here, Section 22(b), Internal Revenue Code, provides that certain items shall not be included in gross income and shall be exempt from taxation, and subsection 22(b)(8), Internal Revenue Code (Appendix, *infra*), thereunder provides for such exclusion from gross income and exemption from taxation, to the extent provided in Section 116, of earned income from sources without the United States. This is the authority upon which taxpayer bases his claim of nontaxability. If taxpayer is correct regarding the exemption of his income under Section 116, then such income should be excluded from gross income; if, however, such income is found taxable by this Court, then it is "properly includible therein". With respect to Section 275(c), taxpayer's disclosure of the income claimed exempt from taxation has no legal effect. He is not reporting such income as gross taxable income. His position is necessarily that the income in question is not "properly includible" in his gross income.

In *Ketcham* v. *Commissioner,* 142 F. 2d 996 (C.A. 2d), the taxpayer attached schedules to her return revealing the receipt of trust income in lieu of alimony which she believed was taxable to her husband. The court held that part of the trust income was taxable to her and that the schedules did not relieve her from the effect of having omitted such amount of gross income. In *Reis* v. *Commissioner,* 142 F. 2d 900 (C.A. 6th), the taxpayer revealed sales and proceeds thereof,

but his basis was improperly computed and no gain was included in the amount extended into gross income. Since the gain properly computed exceeded twenty-five percent of the taxpayer's stated gross income, Section 275 (c) was invoked to offset the bar that otherwise would have been imposed by the statute of limitations.

Taxpayer's claim of exemption resulted in a failure to include any amount of gross income stated in the returns. Assuming that this Court agrees with the Commissioner's position that the income was properly includible in the returns, taxpayer understated his income by one hundred percent, rather than by twenty-five percent.

The taxpayer argues (Br. 16) that the Commissioner was fully informed as to the amount he earned, and that in such circumstances Section 275(c) is without application. That fact makes no difference here. The report of the Senate Finance Committee from which we have quoted above shows plainly that Congress had just such a situation as the instant one in mind when it passed the five-year statute. Section 275(c) contains no exception as to cases where the Commissioner is acquainted with the facts, and it is clear that none should be read into it.

The cases of *Uptegrove Lumber Co.* v. *Commissioner,* 204 F. 2d 570 (C.A. 3d), and *Van Bergh* v. *Commissioner,* 18 T.C. 518, on which taxpayer relies (Br. 12-14, 17-18) are clearly distinguishable on their facts. Moreover, to the extent that the *Uptegrove* case may be considered authority for the taxpayer's position here, it is submitted that it is clearly wrong, and should not be

followed by this Court. *O'Bryan* v. *Commissioner, supra; M. C. Parrish & Co.* v. *Commissioner, supra.*

The Congressional intent is clear from the plain and unambiguous language of the statute. In the light of its provisions, and the decided cases by this and other courts, the conclusion is compelled that the Tax Court was clearly correct in finding that taxpayer omitted from gross income reported in the taxable years amounts properly includible therein which are in excess of twenty-five percent of the amount of gross income stated in the returns, and, therefore, that the five-year statute of limitations in subsection (c) of Section 275 of the Code is clearly applicable.

CONCLUSION

The decision of the Tax Court was correct on both issues and should be affirmed.

Respectfully submitted,

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February, 1954.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * *

(8) *Miscellaneous items.*—The following items, to the extent provided in section 116:

Earned income from sources without the United States;

* * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 25. CREDITS OF INDIVIDUAL AGAINST NET INCOME.

(a) *Credits for Normal Tax Only.*—There shall be allowed for the purpose of the normal tax, but not for the surtax, the following credits against the net income:

* * * *

(4)[5] *Earned income definitions.*—For the purposes of this section—

(A) "Earned income" means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, but does not include any amount not

[5] This subsection was repealed by Section 107(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21, as to taxable years beginning after December 31, 1943.

included in gross income, nor that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the case of a taxpayer engaged in in a trade or business in which both personal services and capital are material income producing factors, a reasonable allowance as compensation for the personal services actually rendered by the taxpayer, not in excess of 20 per centum of his share of the net profits of such trade or business, shall be considered as earned income.

* * * *

(26 U.S.C. 1940 ed., Sec. 25.)

SEC. 116 [As amended by Sec. 148(a), Revenue Act of 1942, c. 619, 56 Stat. 798]. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) *Earned Income From Sources Without the United States.*—

(1) *Foreign resident for entire taxable year.*—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire

taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individuals shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

(2) *Taxable year of change of residence to United States.*—In the case of an individual citizen of the United States, who has been a bona fide resident of a foreign country or countries for a period of at least two years before the date on which he changes his residence from such country to the United States, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof), which are attributable to that part of such period of foreign residence before such date, if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * * *

(26 U.S.C. 1946 ed., Sec. 116.)

SEC. 119. INCOME FROM SOURCES WITHIN THE UNITED STATES.

* * * *

(c) *Gross Income from Sources Without United States.*—The following items of gross income shall be treated as income from sources without the United States:

* * * *

(3) Compensation for labor or personal services performed without the United States;

* * * *

(26 U.S.C. 1946 ed., Sec. 119.)

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * *

(c) *Omission from Gross Income.*—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without

assessment, at any time within 5 years after the return was filed.

* * * *

(26 U.S.C. 1946 ed., Sec. 275.)

Revenue Act of 1943, c. 63, 58 Stat. 21:

SEC. 107. REPEAL OF EARNED INCOME CREDIT.

* * * *

(b) *Earned Income From Sources Without United States.*—Section 116(a) (relating to earned income from sources without the United States) is amended (1) by striking out "if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States" appearing in paragraphs (1) and (2) and inserting in lieu thereof "if such amounts constitute earned income as defined in paragraph (3)"; and (2) by inserting at the end thereof the following new paragraph:

"(3) *Definition of earned income.*—For the purposes of this subsection, 'earned income' means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the case of a taxpayer engaged in a trade or business in which both personal

services and capital are material income producing factors, under regulations prescribed by the Commissioner with the approval of the Secretary, a reasonable allowance as compensation for the personal services rendered by the taxpayer, not in excess of 20 per centum of his share of the net profits of such trade or business, shall be considered as earned income."

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.116-1.[6] *Earned Income From Sources Without the United States.*—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the following conditions are met by the taxpayer claiming such exclusion from his gross income: (a) it is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United States; (c) the income constitutes earned income as defined in section 25(a) if received from sources within the United States; and (d) such

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[6] This section was amended by T.D. 5373, 1944 Cum. Bull. 143, so as to refer to earned income as defined in Section 25(a), Internal Revenue Code, for taxable years beginning before January 1, 1944; and for taxable years after December 31, 1943, to refer to the definition of earned income in Section 116(a)(3), in accordance with the amendment contained in Section 107 of the Revenue Act of 1943, *supra.*

income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

* * * *

Sec. 29.211-2. *Definition.*—A "nonresident alien individual" means an individual—

(a) Whose residence is not within the United States; and

(b) Who is not a citizen of the United States.

The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of

his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

Sec. 29.211-3. *Alien Seamen, When to be Regarded as Residents.*—

* * * *

Sec. 29.211-4. *Proof of Residence of Alien.*—The following rules of evidence shall govern in determining whether or not an alien within the United States has acquired residence therein within the meaning of chapter 1. An alien, by reason of his alienage, is presumed to be a nonresident alien. Such presumpiton may be overcome—

(1) In the case of an alien who presents himself for determination of tax liability prior to departure for his native country, by (a) proof that the alien,

at least six months prior to the date he so presents himself, has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien, at least six months prior to the date he so presents himself, has filed Form 1078 or its equivalent, or (c) proof of acts and statements of the alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident;

(2) In other cases by (a) proof that the alien has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien has filed Form 1078 or its equivalent, or (c) proof of acts and statements of an alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident.

In any case in which an alien seeks to overcome the presumption of nonresidence under (1)(c) or (2)(c), if the internal-revenue officer who examines the alien is in doubt as to the facts, such officer may, to assist him in determining the facts, require an affidavit or affidavits setting forth the facts relied upon, executed by some credible person or persons, other than the alien and members of his family, who have known the alien at least six months prior to the date of execution of the affidavit or affidavits.

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